PRIVILEGES AND WORK

PRODUCT IMMUNITY IN FEDERAL COURT

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I. APPLICATION OF RULE 501 OF THE FEDERAL RULES OF EVIDENCE

A. TEXT OF THE RULE

Rule 501

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State or political subdivision thereof shall be determined in accordance with State law.

B. EFFECT OF RULE 501 ON PRIVILEGES

1. Rule 501 provides the basis for choice of law between federal and state law privileges.

2. Rule 501 provides for the evolution and creation of federal common law privileges.

C. SCOPE OF RULE 501

1. Rule 501 does not affect federal constitutional or statutory privileges. These are always applicable in federal court.

2. Rule 501 does not affect exclusionary doctrines provided by the Federal Rules of Evidence or the Federal Rules of Civil Procedure.

- F.R.E. 407: Subsequent Remedial Measures
- F.R.E. 408: Compromise and Offers to Compromise
- F.R.E. 409: Payment of Medical and Similar Expenses
- F.R.E. 410: Admissibility of Pleas, Plea Discussions
- F.R.E. 411: Liability Insurance

- F.R.C.P. 26(b)(3): Work Product Immunity
- *Baker v. General Motors Corp.,* 209 F.3d 1051, 1053 (8th Cir. 2000)
- *Fasanaro v. Mooney Aircraft Corp.*, 687 F. Supp. 482 (N.D. Cal. 1988)
- *Guy Gannett Publishing Co. v. University of Maine,* 555 A.2d 470 (Me. 1989)
- *Railroad Salvage of Connecticut, Inc. v. Japan Freight Consolidators*, 97 F.R.D. 37 (E.D.N.Y. 1983)

3. Rule 501 does not affect duties of confidentiality imposed by state law.

4. There is no single definition of "privilege" for the purpose of Rule 501.

a. Definition in Supreme Court Advisory Committee Recommended Rule 501:

A rule is a rule of privilege if it involves a claim of a right to:

(1) Refuse to be a witness; or
(2) Refuse to disclose any matter; or
(3) Refuse to produce any object or writing; or
(4) Prevent another from being a witness or disclosing any matter or producing any object or writing.

b. McCormick:

A rule is a rule of privilege if:

(1) The rule was devised to foster some social policy other than the policy of accurate ascertainment of truth; and
(2) The rule may properly be asserted by a person who is not a party.

c. Wigmore:

For a communication to be deemed privileged:

(1) The communication must originate in a confidence that it will not be disclosed;
(2) The element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties;
(3) The relationship must be one that in the opinion of the community ought to be sedulously fostered; and
(4) The injury that would inure to the relationship by the disclosure must be greater than the benefit thereby gained for the correct disposal of the litigation.

- *Kientzy v. McDonnell Douglas Corp.*, 133 F.R.D. 570 (E.D. Mo. 1991)

5. The historical context of Rule 501 indicates a liberal attitude toward privileges by Congress, but federal courts have generally been restrictive.

- F.R.E. Article V as submitted to Congress by the Supreme Court provided that (1) state law privileges would not apply in federal court; and (2) only privileges embodied in the Constitution, federal statutes, and Federal Rules of Evidence would be recognized. There would be no common law development of privileges. Congressional rejection of the Supreme Court proposed rules reflected (1) an affirmation of liberal deference to state privileges; (2) a support for an ongoing development of privileges; and (3) a relative bias in favor of privileges.

- Nevertheless, federal courts commonly recite a principle that because privileges are at odds with truth ascertainment, they should be treated restrictively.

- *Jaffee v. Redmond,* 116 S. Ct. 1923, 1928 (1996)

- *Trammel v. United States,* 100 S. Ct. 906, 912 (1980)

- *Carman v. McDonnell Douglas Corp.,* 114 F.3d 790, 792-95 (8th Cir. 1997) (discussing factors involved in assessing a claim of a new privilege, rejecting an ombudsman privilege, and holding that the scope of a privilege and the decision whether to establish a new privilege are mixed questions of fact and law to be reviewed *de novo* on appeal)

D. CHOICE OF LAW BETWEEN FEDERAL COMMON LAW OF PRIVILEGES AND STATE LAW OF PRIVILEGES

1. Federal privilege law applies in criminal cases, subject to discretionary application of state privilege law by comity.

- *United States v. Allery*, 526 F.2d 1362, 1365 (8th Cir. 1975)

2. As a rule of thumb, federal privileges apply in civil cases based on federal question jurisdiction, and state privileges apply in civil cases based on diversity jurisdiction. While courts have often stated this as the choice of law test in civil cases, it is not a precise statement of the test. The precise choice of law test is this: Except where a privilege is governed by a federal statute, Supreme Court rule, or the U. S. Constitution, state privilege law applies if the information as to which the privilege is asserted is part of a line of proof culminating in proof of an element of a claim or defense controlled by state law.

- *Commercial Union Ins. Co. of America v. Talisman, Inc.,* 69 F.R.D. 490, 491 (E.D. Mo. 1975) (reciting the federal question/diversity distinction as the test)

- *Hanes v. Mid-America Petroleum, Inc.,* 577 F. Supp. 637, 644 (W.D. Mo. 1983) (noting that F.R.E. 601, which applies a choice of law tests identical to that in Rule 501 for competency issues, is "not based on a diversity/non-diversity distinction," but rather on whether state law provides the rule of decision with respect to the claim or defense at issue)

- *Scott v. McDonald,* 70 F.R.D. 568 (N.D. Ga. 1976)

- *Morrill v. Becton,* 10 Fed. R. Evid. Serv. 185 (E.D. Mo. 1981)
- *Schuler v. United States,* 113 F.R.D. 518 (W.D. Mich. 1986)
- *Burgess Construction Co. v. Morrin & Son Co.*, 526 F.2d 108, 114 n.2 (l0th Cir. 1975)

3. When a court has federal question jurisdiction, but there is a pendant state claim, the general rule is that federal privilege law applies, but there are exceptions.

a. <u>The General rule is that federal privilege law applies.</u>

- *Pinkard v. Charles "Cliff " Johnson,* 118 F.R.D. 517, 519-20 (M.D. Ala. 1987)
- *Eckmann v. Board of Education of Hawthorn School Dist. No. 17,* 106 F.R.D. 70 (E.D. Mo. 1985)
- *Wm. T. Thompson Co. v. General Nutrition Corp.*, 671 F.2d 100, 104 (3d Cir. 1982)
- *Robertson v. Neuromedical Center*, 169 F.R.D. 80, 82-3 (M.D. La. 1996)
- *Memorial Hospital for McHenry County v. Shadur*, 664 F.2d 1058, 1061 n.3 (7th Cir. 1981)
- *Hancock v. Hobbs*, 967 F.2d 462, 466-7 (11th Cir. 1992)
- *Hancock v. Dodson*, 958 F.2d 1367, 1373 (6th Cir. 1992)

b. <u>The General rule applies even where the pendant claim could have been brought under diversity jurisdiction.</u>

- *von Bulow by Auersperg v. von Bulow*, 811 F.2d 136 (2d Cir. 1987)

c. <u>Where a privilege affects evidence related only to a pendant state claim, state privilege law may be applied.</u>

- *Eckmann v. Borad of Education of Hawthorne School Dist.,* 106 F.R.D. 70, 72 (E.D. Mo. 1985)
- *Perrignon v. Bergen Brunswig Corp.*, 77 F.R.D. 455, 458 (N.D. Cal. 1978)

d. <u>Where there is a pendant state claim, the court may look to state privilege law to fill gaps in the federal common law.</u>

- *Roberts v. Heim*, 123 F.R.D. 614, 622 (N.D. Cal. 1988)

4. In federal question cases in which state law provides the relevant rule of decision, courts often deem the state law to be absorbed or incorporated into federal law, and on that basis apply federal privilege law.

- *United States v. Margaritas Mexican Restaurant, Inc.*, 138 F.R.D. 566 (W.D. Mo. 1991), was an action to enforce an IRS levy. The United States sought testimony from the defendant's

accountant relating to the issue of whether Margaritas was in possession of "property or rights to property" belonging to the debtor. The court looked to Missouri law to define property rights. However, the Missouri accountant-client privilege did not apply, because the levy statute did not expressly provide for the use of state law in defining property. Instead, state law was merely "absorbed" into federal law. Hence, federal law, rather than state law, provided the rule of decision for the purpose of Rule 501.

- In *Hanes v. Mid-America Petroleum, Inc.*, 577 F. Supp. 637 (W.D. Mo. 1983), the court held that when Missouri law is applied to give meaning to the term "any oral or written agreement" in a federal statute, state law was being "absorbed" and would not be deemed to supply the rule of decision under F.R.E. 601, which governs choice of law as to competency in language identical to that of Rule 501.

- In claims under the Federal Tort Claims Act, courts must, by statute, look to the substantive law of the state where the wrongful act occurred. However, many courts hold that state law in these cases is not "self-operative," but rather is incorporated as the federal law. These cases apply federal privilege law. *Young v. United States*, 149 F.R.D. 199, 201 (S.D. Cal. 1993); *Syposs v. United States*, 63 F. Supp.2d 301, 303 (W.D.N.Y. 1999). Other cases have held state law privileges to be applicable in FTCA cases. *Oslund v. United States*, 128 F.R.D. 110, 112-3 (D. Minn. 1989); *Schuler v. United States*, 113 F.R.D. 518, 520 (W.D. Mich. 1986); *Huzjak v. United States,* 118 F.R.D. 61, 63 (N.D. Ohio 1978).

- In *Burroughs v. Redbud Community Hospital*, 187 F.R.D. 606 (N.D. Cal. 1998), the court held that federal privilege law was applicable in a claim under the Emergency Medical Treatment and Active Labor Act, even though the statute provided that damages, the issue to which the privilege was relevant, would be determined in accordance with state law. The court held that in order for state law to provide the "rule of decision" for the purpose of Rule 501, the state law must have been "self-operative" in that it provided the source of the right sued upon. Here, federal law provided the source of the right.

5. Even where federal law provides the rule of decision, state privileges are sometimes applied as a matter of comity.

a. <u>The interest in according comity is deemed a strong interest, which some courts have considered to be compelling where the state privilege may be applied at no substantial cost to federal policy.</u>

- *Flora v. Hamilton*, 81 F.R.D. 576 (M.D.N.C. 1978)
- *Schafer v. Parkview Memorial Hosp., Inc.*, 593 F. Supp. 61 (N.D. Ind. 1984)

b. <u>Application of a state privilege not recognized by federal law will almost always conflict with the federal interest in truth ascertainment, but in order to be applied, it must otherwise be consistent with the federal policies implicated in the case.</u>

- *Syposs v. United States*, 179 F.R.D. 406, 409 (W.D.N.Y. 1998)
- *Burroughs v. Redbud Community Hospital Dist.*, 187 F.R.D. 606, 608-9 (N.D. Cal. 1998)
- *Weekoty v. United States*, 30 F. Supp.2d 1343, 1347 (D.N.M. 1998)

c. Comity is more likely to be accorded where there is a pendant state claim or where the substantive rule of decision is absorbed state law.

- *American Civil Liberties Union of Miss. v. Finch*, 638 F.2d 1336, 1343 (5th Cir. 1981)
- *Roberts v. Heim*, 123 F.R.D. 614, 622 (N.D. Cal. 1988)

d. The existence of an analogous federal privilege supports adoption of a state privilege by comity.

- *In re Grand Jury Empaneled Jan. 21, 1981*, 535 F. Supp. 537, 541-2 (D.N.J. 1982) (recognizing a qualified state privilege for state tax returns, analogous to 28 U.S.C. § 6103(i)(1), which applies to federal tax returns)

6. Even where the existence of a privilege is determined by state law, the sufficiency of evidence to sustain or defeat the privilege, or the procedure for regulating the privilege, may be deemed a procedural issue governed by federal law.

- *Pritchard-Keang Nam Corp. v. Jaworski*, 751 F.2d 277, 281 n.4 (8th Cir. 1984) (even in a diversity case, the issue of whether a *prima facie* case to support the crime-fraud exception to the attorney-client privilege has been established may be a matter of federal law)
- *In re Federal Skywalk Cases,* 95 F.R.D. 477 (W.D. Mo. 1982) (holding that even though Missouri law applied to determine the substance of the attorney-client privilege, the court had authority to conduct an *in camera* inspection in spite of Missouri's disapproval of the practice, because the procedure for regulating the privilege is not determined by state law)
- *Filz v. Mayo Foundation,* 136 F.R.D. 165, 172-175 (D. Minn. 1991) (holding that a Minnesota statute providing that plaintiff's counsel is entitled to be present at interview of plaintiff's physician in medical malpractice actions is procedural, and thus not applicable even in a diversity action)

E. CHOICE OF LAW AMONG STATES

1. In determining what state's privilege law to apply, many federal courts, including the Eighth Circuit, apply the choice-of-law rule of the forum state as to privileges.

- *Pritchard-Keang Nam Corp. v. Jaworski*, 751 F.2d 277, 281 n.4 (8th Cir. 1984) ("under the *Erie* doctrine, a federal court must apply the forum's conflict of laws rules. (citing *Klaxon v. Stentor Elec. Mfg. Co.*, 61 S. Ct. 1020 (1941)))
- *Baker v. General Motors Corp.*, 209 F.3d 1051, 1057 (8th Cir. 2000) (*Heaney dissenting)*
- *Samuelson v. Susen,* 576 F.2d 546, 551 (3d Cir. 1978)
- *Mazzella v. Philadelphia Newspapers, Inc.*, 479 F. Supp. 523, 526 (E.D.N.Y. 1979)

2. Other courts apply (1) the privilege law of the state that supplies the relevant rule of decision, (2) the privilege law of the forum in which the federal court sits, or (3) a federal common law choice-of-law rule.

a. Privilege law of state that supplies the rule of decision.

- *Huzjac v. U.S.,* 118 F.R.D. 61, 63 (N.D. Ohio 1987)
- *Scott Paper Co. v. Ceilcote Co., Inc.*, 103 F.R.D. 591, 597 (D. Me. 1984)

b. Privilege law of forum in which the federal court sits.

- *Miller v. Transamerican Press, Inc*., 621 F.2d 721 (5th Cir. 1980)

c. Federal common law on choice-of-law.

- *Mitsui Co. v. Puerto Rico Water Resources Auth*., 79 F.R.D. 72, 78 (D. P.R. 1978)
- *Independent PetroChemical Corp. v. Aetna Casualty and Surety Co.*, 117 F.R.D. 292 (D. D.C. 1987)
- *Armour International Co. v. Worldwide Cosmetics, Inc.*, 689 F.2d 134 (7th Cir. 1982)

3. In the case of depositions outside of the forum state, some courts that would otherwise look to the privileges or choice-of-law rule of the forum state apply the privileges or choice-of-law rule of the state in which the discovery is sought.

a. Application of privileges or choice-of-law rule of the state in which discovery is sought.

- *Roberts v. Carrier Corp.,* 107 F.R.D. 678 (N.D. Ind. 1985)
- *In re Westinghouse Elec. Corp. Uranium Contracts*, 76 F.R.D. 47 (W.D. Pa. 1977)
- *Connolly Data Systems, Inc. v. Victor Technologies, Inc*., 114 F.R.D. 89, 91 (S.D. Cal. 1987)
- *Eckmann v. Board of Education of Hawthorn School Dist.,* 106 F.R.D. 70, 72 (E.D. Mo. 1985)

b. Application of choice-of-law rule of the trial forum.

- *Wm. T. Thompson Co. v. General Nutrition Corp., Inc.*, 671 F.2d 100, 104 (3d Cir. 1982)
- *R & J Dick Co., Inc. v. Bass and Belting, Inc.*, 295 F. Supp. 758 (N.D. Ga. 1968)

4. There are three state law approaches to choice-of-law on privileges: (1) some states automatically apply forum privileges; (2) some states apply the Restatement rule, which favors the less restrictive of forum law or the law of the state with the most significant relationship to the communication; and (3) some states apply an analysis to determine the "predominantly concerned jurisdiction."

a. Traditional common law: forum state privileges apply.

b. Restatement rule:

(1) Evidence that is not privileged under the local law of the state which has the most significant relationship with the communication will be admitted, even though it would be privileged under the local law of the forum, unless the admission of such evidence would be contrary to the strong public policy of the forum.

(2) Evidence that is privileged under the local law of the state which has the most significant relationship with the communication but which is not privileged under the local law of the forum will be admitted unless there is some special reason why the forum policy favoring admission should not be given effect.

A.L.I., Restatement (Second) of Conflict of Laws, § 139

c. Predominantly concerned jurisdiction test.

- *Samuelson v. Susen*, 576 F.2d 546 (3d Cir. 1978)
- *Super Tire Engineering v. Bandag, Inc.*, 562 F. Supp. 439 (E.D. Pa. 1983)
- *Newton v. National Broadcasting Company, Inc.*, 109 F.R.D. 522, 529 (D. Nev. 1985)
- *Mazella v. Philadelphia Newspapers, Inc.*, 479 F. Supp. 523 (E.D.N.Y. 1979)

II. NON-GOVERNMENTAL FEDERAL COMMON LAW PRIVILEGES

A. ATTORNEY-CLIENT PRIVILEGE

1. Statement of the Federal Privilege

The Eighth Circuit has recited three statements of the privilege:

(1) Supreme Court Standard 503 (Proposed F.R.E. 503, rejected by Congress).
Standard 503. Lawyer-Client Privilege.

(a) Definitions--As used in this rule:

(1) A “client” is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him.

(2) A “lawyer” is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

(3) A “representative of the lawyer” is one employed to assist the lawyer in the rendition of professional legal services.

(4) A communication is “confidential” if not intended to be disclosed to third persons other than to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(b) General rule of privilege.--A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between himself or his representative and his lawyer or his lawyer's representative, or (2) between his lawyer and the lawyer's representative, or (3) by him or his lawyer to a lawyer representing another in a matter of common interest, or (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.

(c) Who may claim the privilege.--The privilege may be claimed by the client, his guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer at the time of the communication may claim the privilege but only on behalf of the client. His authority to do so is presumed in the absence of evidence to the contrary.

(d) Exceptions.--There is no privilege under this rule:

(1) Furtherance of crime or fraud.--If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud; or

(2) Claimants through same deceased client.--As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction; or

> (3) Breach of duty by lawyer or client.--As to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer; or
>
> (4) Document attested by lawyer.--As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or
>
> (5) Joint clients.--As to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.

- *In re Bieter Co.*, 16 F.3d 929, 935 (8th Cir. 1994) (although not enacted by Congress, "courts have relied upon [Standard 503] as an accurate definition of the federal common law of an attorney-client privilege")

- *United States v. Cote,* 456 F.2d 142, 144 n.2 (8th Cir. 1972) (citing preliminary draft of Rule 503 and comments to support proposition that communications with client's accountant would be privileged if necessary for rendition of effective legal services)

(2) Judge Wyzanski:

> The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

- *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 601 (8th Cir. 1997), quoting from *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357, 358-9 (D. Mass. 1950)

(3) Wright & Miller:

> [W]here legal advice of any kind is sought from a professional legal advisor in his capacity as such, the communications relevant to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal advisor except the protection be waived.

- *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 601 (8th Cir. 1997)

2. General Principles of the Privilege

(1) The purpose of the privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."

- *Upjohn Co. v. United States*, 101 S. Ct. 677, 682 (1981)

(2) The attorney-client privilege extends only to communications, and not to facts. A party may not refuse to disclose a fact because it was communicated to counsel.

- *Upjohn Co. v. United States,* 101 S. Ct. 677, 685-6 (1981)

(3) In order for a communication to an attorney to be privileged, it must be an intentional communication for the purpose of obtaining legal advice or services.

- *United States v. Weger*, 709 F.2d 1151 (7th Cir. 1983) (letter to attorney not privileged to extent that it is sought to prove style of type used by defendant)
- *U.S. v. Alexander,* 287 F.3d 811, 816 (9th Cir. 2002) (a threat to commit violence is not a communication to obtain legal advice)
- *U.S. v. White*, 970 F.2d 328, 335 (7th Cir. 1992) (while clients' non-disclosure of assets have been a "communication," it was not for the purpose of seeking legal advice, and therefore was not privileged)
- *In re Grand Jury Proceedings*, 220 F.3d 568, 571 (7th Cir. 2000) (material transmitted to an attorney to be used on a tax return is not privileged, because the preparation of a tax return is an accounting, not legal, service. It is privileged if the sole purpose of conveying it was legal advice)
- *In re Sealed Case*, 737 F.2d 94 (D.C. Cir. 1984)

(4) Only the substance of communications is protected. Such matters as the nature of legal services, the number and date of meetings or communications, fees charged or the identity of participants in communications generally are not privileged. However, such matters may come within the privilege if (1) there is a strong probability that the disclosure would implicate the client in criminal activity, (2) it would provide the "last link" in a chain of incriminating evidence, or (3) disclosure would necessarily disclose confidential communications.

- *U.S. v. Sindel*, 53 F.3d 874, 876 (8th Cir. 1995)
- *Clarke v. American Commerce Nat'l Bank*, 974 F.2d 127 (9th Cir. 1992)
- *In re Sealed Case*, 877 F.2d 976, 979 (D.C. Cir. 1989) (even the name of the client or the existence of an attorney-client-relationship may be privileged if disclosure would implicate the client in an offense for which the attorney was employed)

(5) The attorney-client privilege does not protect against disclosure of observations of an attorney, such as of the client's condition, that are not intentional communications to the attorney.

- *U.S. v. Kendrick,* 331 F.2d 110, 113-4 (4th Cir. 1964)

(6) Communications regarding court administrative matters generally are not deemed to be confidential in nature, and therefore are not privileged.

- *United States v. Gray,* 876 F.2d 1411, 1415 (9th Cir. 1989) (a communication concerning a defendant's sentencing date and obligation to appear is not of a confidential nature and therefore is not protected by the attorney-client privilege)

(7) The attorney-client privilege protects only communications and documents that reflect communications; it does not protect notes made for the purpose of a communication that never occurred.

- *U.S. v. DeFonte*, 441 F.3d 92, 95-6 (2d Cir. 2006) (A client's notes memorializing a privileged communication, prepared after the communication, are privileged. But a client's notes prepared in anticipation of a communication with an attorney are not protected by the privilege unless they or their substance is communicated to the attorney)

(8) An attorney's work product, including work product not protected by the work product doctrine because it was not prepared in anticipation of litigation, is protected by the attorney-client privilege even though it was never communicated to the client, if it reflects confidential communications.

- *Muller v. Walt Disney Productions*, 871 F. Supp. 678, 682 (S.D.N.Y. 1994) (protecting preliminary drafts of contract because they may reflect client confidences and legal advice)

- *United States v. Willis*, 565 F. Supp. 1186, 1194 (S.D. Iowa 1983) (if client confidences can be inferred from attorney's notes and research materials, they are attorney-client privileged)

(9) The privilege protects only communications that are made in confidence.

- *In re Grand Jury Subpoenas*, 179 F. Supp. 2d 270, 283 (S.D.N.Y. 2001)

- *In re John Doe Corporation*, 675 F.2d 482, 489 (2d Cir. 1982) (no matter what economic imperatives may drive a disclosure, the disclosure defeats the privilege)

(10) Communications made or received by or in the presence of an agent or consultant of the attorney or client are privileged, where the agent or consultant is necessary or highly useful for consultation regarding legal services.

- *United States v. Cote*, 456 F.2d 142, 144 (8th Cir. 1972) (work papers of accountant based on communications from the client were privileged where the attorney had retained the accountant to audit the client's books to enable the attorney to give legal advice. The test was whether the accountant's services were "a necessary aid to the rendering of effective legal services to the client.")

- *United States v. Ackert*, 169 F.3d 136 (2d Cir. 1999) (an attorney's communication with the client's investment broker was not privileged, because the broker was not acting as a translator for the communication)

- *In re Bieter Co.,* 16 F.3d 929, 938-9 (8th Cir. 1994) (analyzing the issue, in the corporate context, under the *Diversified Industries, Inc. v. Meredith* test for employees)

- *Cavallaro v. U.S.,* 284 F.3d 236, 247 (1st Cir. 2002) (the presence of an accountant, whether hired by the lawyer or client, does not destroy the privilege, if the accountant is necessary or highly useful for effective consultation for legal advice)

(11) A communication is not confidential if the client knows that there is a thirty-party witness to it who is not an agent of the attorney or client whose presence assists the communication.

- *U.S. v. Goodapple,* 958 F.2d 1402, 1409 (7th Cir. 1992)

- *U.S. v. Hatcher,* 323 F.3d 666, 674 (8th Cir. 2003) (known prison recording device is the functional equivalent of the presence of a third party, and thus negates the privilege)

(12) The presence of a relative or other person close to the client will not necessarily be deemed to negate the attorney-client privileged status of a communication, even though the person is not a representative or agent of the client.

- *Kevlik v. Goldstein*, 724 F.2d 844, 849 (1st Cir. 1984)

- *United States v. M.I.T.*, 129 F.3d 681, 684 (1st Cir. 1987)

- *United States v. Evans*, 113 F.3d 1457, 1463 (7th Cir. 1997)

(13) One measure of the confidentiality of a communication is the degree of care exercised by the attorney and the client in limiting access to the communication.

- *Jarvis, Inc. v AT&T*, 84 F.R.D. 286, 292 (D. Colo. 1979)

- *In re Horowitz*, 482 F.2d 72, 81-2 (2d Cir. 1973)

- *In re Victor*, 422 F. Supp. 475, 476 (S.D.N.Y. 1976)

- *Jonathan Corp. v. Prime Computer, Inc.*, 114 F.R.D. 693, 696 n. 6 (E.D. Va. 1987) (marking of a document distributed within an organization as “privileged” or “confidential” may have a bearing on a court’s determination whether it was intended to be confidential)

(14) A communication that is made with the expectation that its substance will be disclosed to a third person who is not an agent of the attorney or client generally is not considered to be confidential, and thus is not subject to the attorney-client privilege whether or not it is disclosed.

- *United States v. Windfelder,* 790 F.2d 576, 579-80 (7th Cir. 1986) (a communication to an attorney with the expectation that it will be used in a tax return, or to explain to

the IRS a discrepancy, is not attorney-client privileged because it was not intended to be confidential)

- *U.S. v. Aronson*, 781 F.2d 1580, 1581 (11th Cir. 1986) (documents that by their very nature contemplate disclosure to third parties are not privileged)

- *In re Grand Jury Proceedings,* 727 F.2d 1352, 1458 (4th Cir. 1984) (even if prospectus was never issued, information given to attorney for proposed prospectus was not privileged, because it was not intended to be confidential)

(15) A communication is not privileged if it is made to or by an attorney functioning in a capacity other than legal advisor. To be protected, the communication must relate to the legal advice or services sought by the client.

- *In re Grand Jury Subpoenas,* 179 F. Supp. 2d 270, 285 (S.D.N.Y. 2001) ("[i]f a lawyer happens to act as a lobbyist, matters conveyed to the attorney for the purpose of [lobbying] do not become privileged by virtue of the fact that the lobbyist has a law degree, or may under other circumstances give legal advice to the client, including advice on matters that may also be the subject of the lobbying efforts.")

- *U.S. v. Horvath,* 731 F.2d 557, 561 (8th Cir. 1984) (privilege extends only communications to facilitate the rendition of legal services, and does not apply where the attorney acts as a scrivenor, conduit for funds, or business advisor)

- *U.S. v. Bisanti,* 414 F.3d 168, 171-2 (1st Cir. 2005) (where an attorney who was also an accountant represented a client in an IRS audit proceeding, the client's communication regarding authority to compromise was not privileged because the representation was characteristic of an accountant-client relationship)

- *Mission National Ins. Co. v. Lilly*, 112 F.R.D. 160 (D. Minn. 1986)

- *Saxholm AS v. Dynal, Inc.*, 164 F.R.D. 331, 335-6 (E.D.N.Y. 1996)

(16) If an attorney's primary role is as an officer, director, business associate or advisor of the client, there may be no privilege, even as to legal advice.

- *United States v. Faltico*, 586 F.2d 1267 (8th Cir. 1978)

- *SEC v. Gulf & Western Ind.*, 518 F. Supp. 675, 683 (D. D.C. 1981)

- *Federal Savings & Loan Ins. Corp. v. Fielding*, 343 F. Supp. 537, 546 (D. Nev. 1972)

- *Teltron, Inc. v. Alexander*, 132 F.R.D. 394, 396 (E.D. Pa. 1990)

- *Itoba Ltd. v. LEP Group PLC*, 930 F. Supp. 36, 43 (D. Conn 1996)

(17) A communication is not privileged if it is made for the purpose of getting advice for the commission of a fraud or crime. In order for a party seeking disclosure of documents to avail itself of this exception, it must make a showing of a factual basis sufficient to support a good faith belief that a review of the documents may reveal evidence that the crime-fraud exception applies. The court may then, in its discretion, conduct an *in camera* review of the documents sought. Some courts extend the exception beyond crime and fraud to other torts or forms of misconduct.

- *In re Bankamerica Corp. Securities Litigation,* 270 F.3d 639, 641-5 (8th Cir. 2001) (district court must determine, separatey for each document, whether the party seeking disclosure on this ground has made the threshold showing of a factual basis for a good faith belief that the party claiming privilege was engaged in fraud or crime and communicated with counsel in its furtherance. The court should be highly reluctant to order production without an *in camera* review)
- *Pritchard-Keang Nam Corp. v. Jaworski,* 751 F.2d 277, 280-284 (8th Cir. 1984)
- *U.S. v. Zolin*, 109 S. Ct. 2619, 2623, 2626-32 (1989)
- *In re Grand Jury Investigation,* 974 F.2d 1068, 1073 (9th Cir. 1992) (emphasizing that *Zolin* requires only evidence sufficient to support a reasonable good faith belief that a review of the documents *may reveal evidence* to establish the claim, not a good faith belief that the exception applies)
- *In re A.H. Robbins Co.,* 107 F.R.D. 2 (D. Kan. 1985)
- *In re Sealed Case*, 676 F.2d 793 (D.C. Cir. 1982)

(18) A person's confidential communications with his attorney concerning the disposition of his estate are not subject to the attorney-client privilege in an action among claimants to his estate.

- *Swidler & Berlin v. United States,* 118 S. Ct. 2081, 2085 (1998)

(19) If two or more persons jointly consult an attorney on a matter, on which their legal interests are aligned, their communications with the attorney, though known to each other, are privileged as to third parties. The privilege cannot be waived as to any of the clients without its consent, except in an action between them or where their interests are strongly opposed.

- *Ohio Sealy Mattress Mfg. Co. v. Kaplan*, 90 F.R.D. 21, 29 (N.D. Ill. 1980)
- *Reed v. Baxter*, 134 F.3d 351, 357-8 (6th Cir. 1998)
- *Bass Pub Ltd. v. Promus Cos.*, 868 F. Supp. 615 (S.D.N.Y. 1994)
- *In re Regents of the University of California*, 101 F.3d 1386, 1390

(20) When two or more parties share a common interest in existing or reasonably contemplated civil or criminal litigation, and they have agreed to an ongoing joint pursuit of their common interest, communications in pursuit of the common interest among counsel or by one party to counsel for another party are privileged. Some courts have not required existing or contemplated litigation in order to apply this common interest doctrine.

- *Continental Oil Co. v. United States*, 330 F.2d 347 (9th Cir. 1964)
- *United States v. Under Seal*, 902 F.2d 244, 249 (4th Cir. 1990) (applies to civil arena)
- *SCM Corp. v Xerox Corp.*, 70 F.R.D. 508, 513 (D. Conn. 1976) (the privilege need not be limited to situations of existing or impending litigation)
- *Federal Election Comm'n v. Christian Coalition*, 178 F.R.D. 61, 72-3 (E.D. Va. 1998) (no common interest privilege existed, because at the time the corporation shared privileged communication with individual, there was no indication that the individual was the "target or about to become the target of the IRS probe or any other litigation.")
- *Schachar v. American Academy of Opthamology, Inc.*, 106 F.R.D. 187, 192 (N.D. Ill. 1985) (the common interest doctrine applies to communications to the attorneys, but not among the parties)
- *United States v. Moss*, 9 F.3d 543, 550 (6th Cir. 1993) (joint defense privilege requires an ongoing and joint effort to set up a joint defense strategy)

(21) The attorney-client privilege may apply to communications from the attorney to the client. Some courts accord the privilege to all of the attorney's communications to the client made for the purpose of providing legal assistance. Some require that the attorney's communication relate to a confidential communication by the client. Other courts accord the privilege only if the attorney's communication would tend to reveal confidential communications by the client. In the Eighth Circuit, the attorney's communication is privileged if it is related to the client's privileged communication.

- *Rehling v. City of Chicago*, 207 F.3d 1009, 1019 (7th Cir. 2000) (lawyer's statements to client are privileged when they rest on confidential information obtained from the client or would reveal the substance of a confidential communication from the client)
- *Sprague v. Thorn Americas, Inc.*, 129 F.3d 1355, 1370 (10th Cir. 1997) (to be privileged, attorney's communications need not reveal client communications)
- *Ohio-Sealy Mattress Mfg. Co. v. Kaplan*, 90 F.R.D. 21, 28 (N.D. Ill. 1980)*; Walsh v. Northrop Grumman Corp.*, 165 F.R.D. 16, 18 (E.D.N.Y. 1996) (opposite view)
- *Schwimmer v. United States*, 232 F.2d 855, 863 (8th Cir. 1956) (the privilege covers communications made by the attorney to the client related to the client's privileged communications)

- *Clute v. Davenport, Co.,* 118 F.R.D. 312, 314-15 (D. Conn. 1988) (deposition question asking plaintiff to state facts supporting her allegations was not barred by attorney-client privilege even though plaintiff learned the facts only from her lawyer, because the lawyer's communication to the plaintiff did not reflect her communications to the lawyer)

(22) A communication by a corporate employee to corporate counsel is privileged if: (1) the communication was made at the direction of corporate superiors; (2) the communication was made in order for the corporation to secure legal advice; (3) the information communicated was not available from upper echelon management; (4) the communication concerned matters within the scope of the employee's duties; and (5) the employee was aware that he was questioned in order for the corporation to obtain legal advice.

- *Upjohn v. United States*, 101 S. Ct. 677, 685 (1981) (stating that these are sufficient conditions)

(23) In the Eighth Circuit, the attorney-client privilege is applicable to a communication on behalf of a corporation by an employee, agent or independent contractor with a significant relationship to the corporation and the corporation's involvement in the transaction that is the subject of the legal services, if (1) the communication was made for the purpose of securing legal advice; (2) the person making the communication did so at the direction of his corporate superior; (3) the superior made the request so that the corporation could secure legal advice; (4) the subject matter of the communication was within the scope of the person's duties on behalf of the corporation; and (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents. The test is applicable to partnerships as well.

- *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 609 (8th Cir. 1977)

- *In re Bieter,* 16 F.3d 929, 935-9 (8th Cir. 1994) (applying the test to a partnership and stating that it is inappropriate to distinguish between employees and independent contractors)

(24) A successor in interest to the client, or a new representative of the client, generally gains control over the privilege.

- *Commodity Futures Trading Com'n. v. Weintraub*, 105 S. Ct. 1986 (1985) (In a solvent corporation, authority to waive the privilege rests with the corporation's management. When control passes to new management, so passes authority to waive the privilege, even if the privileged communication was by a former officer or director. A trustee in bankruptcy stands in the shoes of management and thus may waive the privilege. Even a debtor-in-possession may have a fiduciary obligation to creditors to waive the privilege in the interest of fairness.)

- *United States v. DeLillo*, 448 F. Supp. 840 (E.D.N.Y. 1978) (the current trustee of a union pension fund could waive the privilege as to communications by a former trustee, and the attorney could not assert the privilege)

- *In re Sealed Case*, 120 F.R.D. 66, 70-72 (N.D. Ill. 1988) (when a subsidiary is sold through a stock sale, the new management may waive the privilege for communications before sale, unless the privilege pertained to a joint representation of the parent and subsidiary in litigation, or unless the parties contracted to the contrary)

- *Central National Ins. Co. v. Medical Protective Co.*, 107 F.R.D. 393, 394-5 (E.D. Mo. 1985) (in an action against an insurer for failure to settle, an excess insurer that is subrogated to the rights of the insured is entitled to discover the insurer's communications with its attorney during settlement negotiations, because the attorney represented the insurer and insured jointly)

(25) A communication between a former corporate employee and corporate counsel may be protected by the corporate attorney-client privilege if the communication would otherwise meet the test for a current employee.

- *Upjohn* declined to address the issue of former employees. *Upjohn Co. v. United States*, 101 S. Ct. 677, 685 n.3 (1981)

- In his concurring opinion, J. Burger advocated a rule that communications with former employees are covered. *Upjohn*, 101 S. Ct. at 689. He assumed that it was possible for a former employee to communicate "at the direction of" superiors.

- *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 658 F.2d 1355, 1361 n.7 (9th Cir. 1981) (communications with former employees included if needed to advise the client)

- The requisite confidentiality is absent if the former employee has cooperated with the corporation's adversary. *United States v. King*, 536 F. Supp. 253, 259 (C.D. Cal. 1982)

- Some courts have considered a communication with a former employee not to be privileged if opposing counsel could ethically have contacted the former employee *ex parte*. *Dubois v. Gradco Systems, Inc.*, 136 F.R.D. 341 (D. Conn. 1991)

(26) A lawyer representing a corporation does not thereby represent the directors, officers or shareholders.

- *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 601 (8th Cir. 1997)

(27) In order for a corporate officer or employee to claim an attorney-client relationship with corporate counsel, he must at a minimum have an objectively reasonable belief that he is being represented personally. A personal attorney-client privilege for the officer may require that (1) it was clear to both the attorney and the officer that advice was sought in an individual capacity, (2) other corporate employees were not present, and (3) the communications did not concern the affairs of the corporation.

- *United States v. Keplinger*, 776 F.2d 678, 701 (7th Cir. 1985)

- *Wylie v. Marley Co.*, 891 F.2d 1463, 1471-2 (10th Cir. 1989)

- *In re Grand Jury Subpoena*, 144 F.3d 653 (10th Cir. 1998)

(28) In a shareholder derivative suit, though not necessarily in a direct action by shareholders, the corporate attorney-client privilege is subject to the right of the stockholders to show cause that they should have access to the communication.

- *Garner v. Wolfinbarger*, 430 F.2d 1093, 1103-4 (5th Cir. 1970) (factors in showing cause include (1) the number of shareholders and the percentage of stock they own; (2) the colorability of the claim; (3) alternative sources for the information; (4) whether the communication related to past or prospective actions; (5) how well the communication has been identified; (6) whether the communication regarded the derivative action itself; and (7) the risk of revealing trade secrets.)

- *Weil v. Investment/Indicators Research Management, Inc.*, 647 F.2d 18, 23 (9th Cir. 1981) (*Garner v. Wolfinbarger* test is not applicable in a direct shareholder action, as opposed to action brought on behalf of the corporation)

- *In re ML-Lee Acquisition Fund*, 848 F. Supp. 527, 564 (D. Del. 1994)
- Communication for the purpose of remedying a past wrong, and communications regarding the derivative action itself, are generally protected from a *Garner* attack. *In re LTV Securities Litigation*, 89 F.R.D. 595 (N.D. Tex 1981); *Panter v. Marshall Field & Co.*, 80 F.R.D. 718, 724 (N.D. Ill. 1981); *Cf. Wildbur v. Arco Chemical Co.*, 974 F.2d 631, 645-6 (5th Cir. 1992)

(29) A fiduciary is generally required to disclose to its beneficiary attorney-client communications relating to the fiduciary's performance of its fiduciary role. The *Garner v. Wolfinbarger* test applied in derivative shareholder suits is sometimes applied in the context of other fiduciary relationships to determine whether disclosure is required.

- *Comegys v. Glassell*, 839 F. Supp. 447 (E.D. Tex. 1993) (bank's communications with its attorney concerning operation of property held in trust were not protected from disclosure to the beneficiaries. No showing of cause required.)

- *Fausek v. White*, 965 F.2d 126 (6th Cir. 1992) (a minority shareholder suing a controlling shareholder may, upon showing good cause, discover the corporation's communications with its attorney)

- *Dannon v. Fitzsimmons*, 90 F.R.D. 583 (N.D. Ill. 1981) (pension fund trustee and beneficiaries)

- *Roberts v. Heim,* 123 F.R.D. 614, 622-26 (N.D. Cal. 1988) (general partner cannot assert attorney-client privilege or work product immunity against limited partners)

(30) In the context of a government agency, an attorney-client communication is privileged if it is confined to those authorized to speak or act for the agency in relation to the subject matter of the communications.

- *Alexander v. F.B.I.,* 186 F.R.D. 154, 162 (D. D.C. 1999)

(31) Only the client may waive the attorney-client privilege. An attorney may have express or implied authority to waive the privilege on behalf of the client, such as when the client authorizes the attorney to manage litigation. Absent such authority, and attorney's disclosure of an attorney-client privileged communication does not constitute relinquishment of the privilege by the client.

- *In re von Bulow*, 828 F.2d 94, 100-101 (2d Cir. 1987) (attorney's publication of book disclosing communications waived the privilege only because the client impliedly consented)

- *Schnell v. Schnall,* 550 F. Supp. 650, 653 (S.D.N.Y. 1982) (attorney testifying in SEC hearing without client's authorization could not waive the privilege)

- *United States v. Martin,*773 F.2d 579, 583 (4th Cir. 1985) (where attorney was authorized to represent client before IRS, his disclosure of privileged communications was a waiver)

(32) Ordinarily, the authority to waive the attorney-client privilege of a corporation is commensurate with the authority to assert it, resting with the corporate management as exercised by officers and directors. Some courts have held that authority to waive a corporation's attorney-client privilege extends to the same employees whose communications with counsel are privileged under *Upjohn.*

- *Community Futures Trading Comm'n v. Weintraub,* 105 S. Ct. 1986, (1985)

- *Jonathan Corporation v. Prime Computer, Inc.,* 114 F.R.D. 693, 698-9 (E.D. Va. 1987) (voluntary disclosure of attorney-client privileged memorandum by corporations's marketing representative to a customer in the course of business negotiations waived the privilege)

(33) Disclosure of an attorney-client privileged communication to a third person waives the privilege if the disclosure is voluntary, and may be deemed to waive the privilege if it is careless. Failure to object to a request calling for disclosure of attorney-client privileged communications during discovery or a proceeding may also constitute a waiver

- *U.S. v. Hyles,* 479 F.3d 958, 971 (8th Cir. 2007) (voluntary)

- *Bower v. Weisman,* 669 F. Supp. 602, 605-6 (S.D.N.Y. 1987) (carelessly leaving a document in a room in a suite where another person was staying waives the privilege because it shows lack of interest in confidentiality)

- *Nguyen v. Excel Corp.,* 197 F.3d 200, 206 (5th Cir. 1999) (failure to object)

(34) The attorney-client privilege may be waived without any intentional or knowing relinquishment of the right. This includes waiver by inadvertent disclosure of privileged documents. In determining whether a document has lost its privilege through inadvertent disclosure, the court may consider the following factors: (1) The reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production; (2) the number of inadvertent disclosures; (3) the extent of the disclosures; (4) the promptness of measures taken to rectify the disclosures; and (5) whether the overriding interests of justice would or would not be served by relieving the party of its error. Some courts apply a more lenient approach, and some a stricter approach.

- *Gray v. Bicknell,* 86 F.3d 1472, 1483-4 (8th Cir. 1996) (predicting that Missouri would apply this middle-of-the-road test, and reciting the more lenient and stricter approaches)
- *Parkway Gallery v. Kittringer/Pennsylvania House Group*, 116 F.R.D. 46 (M.D.N.C 1987) (same test)
- *Georgetown Manor, Inc. v Ethan Allen,* 753 F. Supp. 936, 938 (S.D. Fla. 1991) (waiver requires knowing relinquishment of the privilege)
- *In re Sealed Case,* 877 F.2d 976, 980-81 (D.C. Cir. 1981) (any document produced loses privileged status)

(35) The attorney-client privilege is waived where the holder of the privilege places the subject matter of the privileged communication at issue.

- *Baker v. General Motors Corp.,* 209 F.3d 1051, 1055 (8th Cir. 2000)

(a) At-issue waiver does not occur merely because the holder of the privilege makes a claim or gives testimony relating to the same topic as the privileged communication.

- *Baker v. General Motors Corp.,* 209 F.3d 1051, 1055 (8th Cir. 2000)
- *Charles Woods Television Corp. v. Capital Cities/ABC, Inc.,* 869 F.2d 1155, 1162 (8th Cir. 1989)

(b) At-issue waiver occurs primarily where (1) proof of a claim or defense asserted by the privilege holder implicates evidence encompassed in the privileged communication, or (2) the privilege holder's testimony refers to a privileged communication.

- *Baker v. General Motors Corp.,* 209 F.3d 1051, 1055 (8th Cir. 2000)
- *Sedco International, S.A. v. Cory,* 683 F.2d 1201, 1206 (8th Cir. 1982)
- *Fletcher v. Kalina,* 93 F.3d 648, 653 (9th Cir. 1996) (the privilege holder must have tendered an issue touching directly on the substance of the privileged communication)

(36) Particular circumstances in which courts have found "at-issue" waiver of the attorney-client privilege include those in which:

(a) The privilege holder places advice of counsel in evidence.

- *United States v. Workman,* 138 F.3d 1261, 1263 (8th Cir. 1998)
- *Rhone-Poulenc Rorer Inc. v. Home Indemnity Co.,* 32 F.3d 851, 863 (3d Cir. 1994)
- *Dixie Miller Enterprises Supply Co., Inc. v. Continental Casualty Co.,* 168 F.R.D. 554, 559 (E.D. La. 1996)

(b) The privilege holder testifies to a belief in the legality of an action taken.

- *Cox v. Administrator U.S. Steel & Carnegie,* 17 F.3d 1386, 1419 (11th Cir. 1994)
- *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991)

(c) The privilege holder asserts a defense premised on a belief as to the law.

- *Hearn v. Rhay,* 68 F.R.D. 574, 581 (E.D. Wash. 1975)
- *Mitzner v. Sobol,* 136 F.R.D. 359, 361-2 (S.D.N.Y. 1991)

(d) The privilege holder asserts a claim or defense based on the competence or effectiveness of counsel, and attorney-client privileged communications are relevant to the competence or effectiveness.

- *Tasby v. United States*, 504 F.2d 332, 336 (8th Cir. 1974)

(e) The privilege holder asserts a state of mind that is an essential part of a claim or defense, and attorney-client communications are likely to reflect the truth or falsity of the assertion, such as in:

1) A claim that a statute of limitation was tolled by lack of knowledge.

- *Conkling v. Turner,* 883 F.2d 431, 434-5 (5th Cir. 1989)
- *Byers v. Burleson,* 100 F.R.D. 436, 440 (D.D.C. 1983)

2) A defense that the privilege holder acted in good faith.

- *Dawson v. New York Life Ins. Co.,* 901 F. Supp. 1362, 1369 (N.D. Ill. 1995)

3) A claim or defense that the privilege holder acted in reliance on a representation.

- *McLaughlin v. Linde Truck Sales, Inc.,* 714 F. Supp. 916, 919 (N.D. Ill. 1989)

- *United States v. Exxon Corp.,* 94 F.R.D. 246, 249 (D.D.C. 1981)

- *Sedco International, S.A. v. Cory,* 683 F.2d 1201, 1206 (8th Cir. 1982)

4) A contract claim or defense based on extrinsic evidence of intent.

- *Sax v. Sax,* 136 F.R.D. 541, 542 (D. Mass. 1991); *Sax v. Sax,* 136 F.R.D. 542, 544 (D. Mass. 1991)

5) A claim that a plea was invalid because the defendant lacked knowledge of the consequences of the plea.

- *United States v. Woodall,* 438 F.2d 1317, 1324 (5th Cir. 1970)

(f) The privilege holder asserts an "adequate investigation" defense to a sexual harassment claim.

- *Peterson v. Wallace Computer Services, Inc.,* 984 F. Supp 821, 825 (D. Vt. 1997)

(37) The attorney-client privilege is waived as to documents used to refresh a witness's memory in the course of trial or deposition, and may be waived as to documents used to refresh a witness's memory before trial or deposition. Heavy reliance on a particular document supports a finding of waiver.

- F.R.E. 612:

> . . . if a witness uses a writing to refresh his memory for the purpose of testifying either--
>
> (1) while testifying, or
>
> (2) Before testifying, if the court in its discretion determine it is necessary in the interests of justice,
>
> an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness . . ..

- *S & A Painting Co. v. OWB Corp.,* 103 F.R.D. 407, 409-10 (W.D. Pa. 1984) (privilege waived as to notes used to refresh recollection during testimony)

- *Ehrlich v. Howe,* 848 F. Supp. 482, 492-4 (S.D.N.Y. 1994) (documents otherwise protected by attorney-client privilege and work product immunity had to be produced because they were used to refresh witness's recollection before deposition)

- *Joseph Schlitz Brewing Co. v. Muller & Phipps (Hawaii), Ltd.*, 85 F.R.D. 118 (W.D. Mo. 1980) (no automatic waiver)

(38) When a party discloses only a portion of attorney-client privileged communications, the privilege generally is deemed waived only as to the communications disclosed, unless a partial waiver would be unfair to the adversary, in which case the privilege is waived as to communications on the subject matter. Ordinarily, this subject matter waiver occurs only if disclosure is made in a judicial proceeding. However, some courts impose subject matter waiver without reference to this fairness test.

- *Westinghouse v. Republic of the Philippines*, 951 F.2d 1414, 1426 n.12 (3d Cir. 1991)

- *In re von Bulow*, 828 F.2d 94, 102 (2d Cir. 1987) (extrajudicial disclosure of attorney-client privileged communications, not subsequently used in a judicial proceeding to the adversary's prejudice, does not waive privilege as to undisclosed communications)

- *Federal Election Comm'n v. Christian Coalition*, 178 F.R.D. 61, 74 (E.D. Va. 1998) (subject matter waiver is appropriate only when the party seeking the privilege made partial waiver for some tactical purpose. When the disclosure was to a third party, with no effort to use the disclosed material in the pending matter, there should be no subject matter waiver)

- *Texaco Puerto Rico v. Department of Consumer Affairs,* 60 F.3d 867, 883 (1st Cir. 1995) (even inadvertent disclosure gives rise to subject matter waiver)

- *United States v. Cote,* 456 F.2d 142, 144-5 (8th Cir. 1972) (client's accountant's workpapers provided to attorney were attorney-client privileged, but when information from the workpapers was transcribed onto amended tax return, this disclosure waived the privilege not only as to the disclosed data, but also as to the details underlying the data)

- *In re Sealed Case,* 877 F.2d 976, 1980-81 (D.C. Cir. 1989) (inadvertent disclosure gives rise to subject-matter waiver, but there may be no waiver at all if information was acquired by a third party despite all possible precautions)

- *U.S. v. Workman,* 138 F.3d 1261. 1263 (8th Cir. 1998) (waiver covers any information "directly related to" the disclosed communication)

(39) A corporate officer's disclosure in testimony of the corporations's attorney-client privileged communication may give rise to subject matter waiver of the corporation's privilege, but under some circumstances impuation of a waiver to the corporation is deemed unjustified.

- *Versicol Chemical Corp. V. Parsons,* 561 F.2d 671, 675 (7th Cir. 1977) (in grand jury testimony, in-house counsel waived the corporation's attorney-client privilege with respect to communications with outside counsel)

- *In re Grand Jury Proceedings,* 219 F.3d 175, 182-190 (2d Cir. 2000) (when a corporation as an entity makes a strategic decision to disclose some privileged information, a finding of implied waiver is appropriate. But where a corporate officer was subpoenaed in his individual capacity to testify before the grand jury, the corporation's counsel and representatives were excluded from the proceeding, the witness had an independent interest in exculpating his own conduct, and the government suffered little prejudice, his testimony that his consultations with corporate

counsel led him to believe that the corporation's business practices were legal should not necessarily give rise to subject matter waiver by the corporation)

(40) For the purpose of determining whether subject matter disclosure is required, waiver of a portion of privileged communications may be distinguishable from failure to create an attorney client privilege with respect to a portion of the communications.

- *Federal Election Comm'n v. Christian Coalition*, 178 F.R.D. 61, 74 n.12 (E.D. Va. 1998)

(41) Subject matter waiver may require disclosure of communications made after the waiver occurred.

- *Nye v. Sage Products, Inc.*, 98 F.R.D. 452, 454 (N.D. Ill. 1982) (waiver does not affect communications on the same subject made after the waiver)

- *Smith v. Alyeska Pipeline Service Co.*, 538 F. Supp. 977, 980-82 (D. Del. 1982) (waiver extends to communications made after the waiver)

(42) In the Eighth Circuit, voluntary production of attorney-client privileged communications to an agency in a non-public investigation constitutes only a selective waiver of the privilege, at least if the communications disclosed were with outside counsel for the purpose of investigating the client's own wrongdoing. However, other courts generally regard such disclosure as a general waiver that negates the privilege as to other parties.

- *Diversified Ind., Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1977); *United States v. Shyres*, 898 F.2d 647, 657 (8th Cir. 1990) (privilege not waived by disclosure to SEC, grand jury)

- *McDonnell Douglas Corp. v. United States EEOC*, 922 F. Supp. 235, 242-3 (E.D. Mo. 1996) (privilege not waived as to documents turned over to EEOC for discrimination investigation)

- *Biben v. Card*, 119 F.R.D. 421, 428 (W.D. Mo. 1987) (the limitation on the waiver reflected in *Diversified* derives from a self-critical analysis function of the communication: the privilege is waived "unless the information involved was communicated to independent outside counsel for the purpose of assisting [the party asserting the privilege] in investigating [its] own alleged wrongdoing.")

- *Permion Corp. v. United States*, 665 F.2d 1214, 1220-22 (D.C. Cir. 1981); *McMorgan & Co. v. First California Mortgage*, 931 F. Supp. 703, 708 (N.D. Cal. 1996) (rejecting *Diversified* and imposing general waiver)

- *Westinghouse v. Republic of the Philippines*, 951 F.2d 1414, 1423-27 (3d Cir. 1991) (rejecting *Diversified's* selective waiver doctrine because it does not serve the purpose of enabling clients to obtain informed legal advice)

- *In re M & L Business Machine Co., Inc.*, 161 B.R. 689, 694-96 (D. Colo. 1993) (selective waiver for materials provided to United States Attorney preserved as to third parties

where letter agreement governing production provided that production would not constitute a waiver)

(43) The principle underlying subject matter waiver is fairness to the parties; accordingly, the breadth of the waiver imposed should be tailored to remedy the prejudice to the party asserting waiver.

- *In re Grand Jury Proceedings,* 219 F.3d 175, 188 (2d Cir. 2000)

(44) A protective order may define and limit the extent of a waiver, perhaps even as to third parties, resulting from disclosure of attorney-client privileged communications. Contractual limitations on waiver generally affect only the extent of waiver as between the contracting parties, though some courts have considered contractual provisions in preserving selective waivers. Unilateral declarations of limitation on waiver are generally ineffective.

- *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1191 (D.S.C. 1974) (voluntary disclosure of privileged communication, with assertion of limitation of waiver, waives the privilege as to all communications between the attorney and client on the same subject made before the disclosure)

- *I.B.M. Corp. v. United States*, 471 F.2d 507, 509-11 (2d Cir. 1972) (protective order negating waiver in production between IBM and another party in one case, entered to expedite discovery, was effective against the United States in a subsequent case, even though the U.S. was not a party to the first case)

- *Western Fuels Ass'n, Inc. v. Burlington Northern Railroad Co.*, 102 F.R.D. 201, 204 (D. Wyo. 1984) (order that inadvertent disclosure of privileged documents will not constitute waiver is effective, at least between the parties)

- *Westinghouse v. Republic of the Philippines*, 951 F.2d 1414, 1423-27 (3d Cir. 1991) (voluntary disclosure to a third party waives the privilege, even if the third party agrees not to disclose the communication, and this principle applies even if the agreement is embodied in an order)

- *In re M & L Business Machine Co., Inc.,* 161 B.R. 689, 694-96 (D. Colo. 1993) (considering letter agreement in holding that disclosure to U.S. Attorney did not constitute waiver as to other parties)

- Proposed F.R.E. 502 provides that a federal court order that the attorney-client privilege or work product protection has not been waived by a disclosure, if it incorporates the agreement of the parties, is binding on all persons in any state or federal proceeding.

(45) The attorney-client privilege may be invoked only by the client, but the attorney has a duty to assert the privilege on behalf of the client absent direction to the contrary.

- *Schwimmer v. United States*, 232 F.2d 855, 863 (8th Cir. 1956)

(46) The attorney-client privilege may arise where there is no attorney-client relationship. Communications made in preliminary discussions entered with a view to employing a lawyer may be privileged even if the employment does not occur. The privilege may also arise where a person had a reasonable but mistaken belief that the person he was communicating with was acting as his attorney. However, the privilege cannot be conferred by a mistaken belief in the law.

- *In re Avclair,* 961 F.2d 65, 69 (5th Cir. 1992) (preliminary discussions)
- *Westinghouse Electric Corp. v. Kerr-McGee,* 580 F.2d 1311, 1316-18 (7th Cir. 1978) (reasonable belief)
- *In re Grand Jury Subpoena Duces Tecum,*112 F.3d 910, 923-4 (8th Cir. 1997) (mistake of law)

(47) The attorney-client privilege survives the death of the client.

- *Swindler & Berlin v. United States*, 118 S. Ct. 2081, 2088 (1998)

(48) A party seeking to depose an opposing party's counsel may be required to show that the information sought cannot be obtained by any other means, is essential, and is not privileged.

- *Shelton v. American Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986)

(49) Some courts have held that a party may not refuse to disclose attorney-client privileged communications, and then rely on them at trial.

- *International Tel. & Tel. Corp. v. United Tel. Co.,* 60 F.R.D. 177 (M.D. Fla. 1973)

(50) The attorney-client privilege has sometimes been abrogated on the ground of the Sixth Amendment right of a criminal defendant to confront witnesses against him.

- *United States v. Rainone,* 32 F.3d 1203, 1206 (7th Cir. 1994)
- *Swidler & Berlin v. United States,* 118 S. Ct. 2081, 2087 n.3 (1998) (Supreme Court noted existence of issue of whether a criminal defendant's constitutional rights would, under exceptional circumstances, warrant abrogation of the attorney-client privilege held by another person.)

B. MARITAL ADVERSE TESTIMONY PRIVILEGE

1. Statement of the Federal Privilege

A person has a privilege to refuse to testify against his or her spouse in a criminal proceeding.

2. General Principles of the Privilege

(1) The privilege may be asserted only by the witness spouse; the witness spouse may not be compelled to testify or foreclosed from testifying.

- *United States v. Espino*, 317 F.3d 788, 796 (8th Cir. 2003)
- *Trammel v. United States*, 100 S. Ct. 906 (1980)
- *United States v. Darif,* 446 F.3d 701, 707 (7th Cir. 2006)

(2) The purpose of the privilege is to foster the harmony and sanctity of marriage.

- *Trammel*, 100 S. Ct. at 909

(3) The privilege does not require the existence of any confidential communication.

- *United States v. Lilley,* 581 F.2d 182, 189 (8th Cir. 1978)

(4) The marital adverse testimony privilege exists only while the witness and defendant are married.

- *United States v. Smith,* 533 F.2d 1077, 1079 (8th Cir. 1976)

(5) The privilege does not apply if the testimony is in relation to an offense by the non-testifying spouse against the witness spouse. In the Eighth Circuit, this includes a physically, mentally or morally injurious wrong to the witness spouse.

- *United States v. Allery,* 526 F.2d 1362, 1365 (8th Cir. 1975)
- *United States v. Smith,* 533 F.2d 1077, 1079 (8th Cir. 1976)

(6) In the Eighth Circuit, the privilege does not apply if the testimony is in relation to an offense by the non-testifying spouse against the child of either spouse.

- *United States v. Allery*, 526 F.2d 1362, 1367 (8th Cir. 1975)

(7) The applicability of the privilege does not depend on whether the testimony concerns events during the marriage.

- *United States v. Lofton*, 957 F.2d 476, 477 (7th Cir. 1992)

(8) The privilege does not bar admission of out-of-court statements.

- *United States v. Archer,* 733 F.2d 354, 358-59 (5th Cir. 1984)
- *Trammel,* 100 S. Ct. at 913

(9) The privilege may be asserted only if the testimony would be adverse to the non-testifying spouse's interests.

- *In re Grand Jury,* 111 F.3d 1083 (2d Cir. 1997); *In re Snoonian*, 502 F.2d 110 (1st Cir. 1974) (agreement that neither testimony nor fruits of testimony would be used against non-testifying spouse negated the privilege)
- *In re Martenson,* 779 F.2d 461 (8th Cir. 1985) (the privilege does not exist where the testimony would have no discernible impact on any penal or property interest)

(10) Some courts do not observe the privilege where the spouses have irreconcilable marital difficulties. This is questionable in the Eighth Circuit.

- *In re Witness*, 792 F.2d 234 (2d Cir. 1986)
- *United States v. Lilley,* 581 F.2d 182, 189 (8th Cir. 1978) ("we refuse to condition the privilege on . . . on a judicial determination that the marriage is a happy or successful one.")

C. MARITAL CONFIDENTIAL COMMUNICATION PRIVILEGE

1. Statement of the Federal Privilege

A person has a privilege not to testify, or to prevent his or her spouse or former spouse from testifying, as to confidential communications between the spouses made during the marriage.

- *Periera v. United States, 74 S. Ct. 358 (1954)*

2. General Principles of the Privilege

(1) This privilege is available in civil as well as criminal cases, and applies whether or not the testimony would be adverse to either spouse's interests.

- *Hipes v. United States,* 603 F.2d 786, 788-9 (9th Cir. 1979)
- *Haddad v. Lockheed California Corp.,* 728 F.2d 1454, 1456 (9th Cir. 1983)

(2) In order for the privilege to apply, the parties to the communication must have been married at the time of the communication. They do not have to be married at the time the testimony is sought.

- *United States v. Pensinger,* 549 F.2d 1150, 1152 (8th Cir. 1977)

(3) In order to be privileged, the communication must be confidential. Communications made privately between spouses are presumed to have been intended to be confidential. The privilege does not arise if a third party is present or there is an intent that the communication be relayed to a third party.

- *United States v. McConnell,* 903 F.2d 566, 572 (8th Cir. 1990)
- *Periera v. United States,* 74 S. Ct. 358 (1954)
- *United States v. Pensinger,* 549 F.2d 1150, 1152 (8th Cir. 1977)
- *United States v. Evans,* 966 F.2d 398, 401 (8th Cir. 1992)

(4) The communication must have been intend to be confidential by the spouse who made it.

- *United States v. Strobehn,* 421 F.3d 1017, 1021 (9th Cir. 2005)

(5) The privilege ordinarily extends only to statements, not acts. Testimony concerning a spouse's conduct may be subject to the privilege only if the conduct was intended to convey a confidential communication.

- *United States v. Espino,* 317 F.3d 788, 795 (8th Cir. 2003)
- *United States v. Smith,* 533 F.2d 1077, 1079 (8th Cir. 1976)
- *United States v. Estes,* 793 F.2d 465, 467 (2d Cir. 1986)

(6) Permanent separation at the time of the communication may prevent the privilege from arising.

- *United States v. Frank,* 869 F.2d 1177 (8th Cir. 1989)
- *United States v. Evans,* 966 F.2d 398, 401 (8th Cir. 1992)

(7) The privilege does not apply to communications regarding joint ongoing or future illegal activity. In the Eighth Circuit, the illegality must be patent.

- *United States v. Vo,* 413 F.3d 1010, 1017 (9th Cir. 2005)
- *United States v. Evans,* 966 F.2d 398, 401 (8th Cir. 1992)
- *United States v. Archer,* 733 F.2d 354, 360 (5th Cir. 1984)
- *United States v. Darif,* 446 F.3d 701, 706-7 (7th Cir. 2006)

(8) A communication in which one spouse discloses a completed crime to the other may be subject to the privilege, even though the spouse to whom the communication is made may then become an accessory after the fact.

- *United States v. Estes,* 793 F.2d 465, 467 (2d Cir. 1986)

- *But see United States v. Neal,* 743 F.2d 1441, 1446 (10th Cir. 1984) (not deciding, but expressing the view, that in this circumstance the privilege is preserved only if the spouse who received the communication does not then proceed with any further involvement)

(9) A grant of immunity to the witness spouse has no effect on the privilege.

- *Hipes v. United States,* 603 F.2d 786, 787-88 (9th Cir. 1979)

(10) Public knowledge of the facts that were the subject of the communication does not affect the privilege.

- *Hipes v. United States,* 603 F.2d 786, 788 (9th Cir. 1979)

D. PSYCHOTHERAPIST-PATIENT PRIVILEGE

1. Statement of the Federal Privilege

A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications between the patient and a psychotherapist made for the purpose of psychotherapy.

- *Jaffee v. Redmond,* 116 S. Ct. 1923, 1929-32 (1996)

2. General Principles of the Privilege

(1) The privilege covers communications with licenced psychiatrists, psychologists and social workers.

- *Jaffee,* 116 S. Ct. at 1931

(2) The evidentiary need for disclosure should not be balanced against the patient's interest in the confidentiality of the communication.

- *Jaffee,* 116 S. Ct. at 1932

- *Newton v. Komna,* 354 F.3d 776, 784 (8th Cir. 2004)

(3) The privilege is distinguished from the physician-patient privilege, recognized in some states, because the effectiveness of a psychotherapist is deemed to be more dependent on frank disclosure.

- *Jaffee,* 116 S. Ct. at 1928

(4) Although the privilege is not qualified in the sense that the interest in disclosure is routinely to be balanced against the confidentiality interest, the privilege may not apply in certain circumstances, such as in commitment proceedings, where the patient's condition is an element of a claim or defense, where there is a serious threat of harm to the patient or others, or where the examination is court-ordered and the statements offered relate to the purpose of the examination.

- Supreme Court Standard 504
- *Jaffee,* 116 S. Ct. at 1932 n.19
- *Ramer v. United States,* 411 F.2d 30, 40 (9th Cir. 1969)
- *Collins v. Anger,* 577 F.2d 1107, 1109-11 (8th Cir. 1978)

(5) The privilege may not protect against disclosure of a patient's identity.

- *In re Imiga,* 714 F.2d 632, 636 (6th Cir. 1983)

(6) The privilege is not destroyed by the presence of a third person, such as a family member, whose presence furthers the patient's interests.

- Supreme Court Standard 504

E. CLERGY-COMMUNICANT PRIVILEGE

1. Statement of the Federal Privilege

Supreme Court Standard 506:

Communications to Clergy

(a) Definitions. As used in this rule:

(1) A "clergyman" is a minister, priest rabbi, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him.

(2) A communication is "confidential" if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

(b) General Rule of privilege. A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential

communication by the person to a clergyman in his professional character as spiritual advisor.

(c) Who may claim the privilege. The privilege may be claimed by the person, by his guardian or conservator, or by his personal representative if he is deceased. The clergyman may claim the privilege on behalf of the person. His authority so to do is presumed in the absence of evidence to the contrary.

- *Mullen v. United States,* 263 F.2d 275, 280 (D.C. Cir. 1958)

2. General Principles of the Privilege

(1) Communications related to business matters are not protected by the privilege.

- *United States v. Gordon,* 655 F.2d 478 (2d Cir. 1981)

(2) Federal courts often look to state statutes to define the privilege. Some state statutes provide, and some courts have held, contrary to the terms of Supreme Court Standard 506, that the privilege belongs exclusively to the clergyman, and may not be waived by the communicant.

- *Eckmann v. Board of Education of Hawthorne School Dist.,* 106 F.R.D. 70, 73 (E.D. Mo. 1985)

(3) The communication must have been made for the purpose of obtaining spiritual aid or religious or other counsel, advice, solace, absolution or ministration.

- *Mullen v. United States,* 263 F.2d 275, 280 (D.C. Cir. 1958)

(4) The privilege may arise from communications to persons who are not members of the clergy, but who are spiritual advisors.

- *Eckmann, supra*, 106 F.R.D. at 72

(5) Testimony by a clergyman as to his conclusions concerning the communicant's state of mind, based on privileged communications, may not be privileged.

- *U.S. v. Mohanlal,* 867 F. Supp. 199, 201 (S.D.N.Y. 1994)

F. TRADE SECRETS

1. Statement of the Federal Privilege

Supreme Court Standard 508:

A person has a privilege, which may be claimed by him or his agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by him, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice. When disclosure is directed, the

judge shall take such protective measure as the interests of the holder of the privilege and of the parties and the furtherance of justice may require.

Rule 26(c)(7), Fed. R. Civ. P.:

A court may order . . . "that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way."

2. General Principles of the Privilege

(1) This is a qualified privilege. The court must consider the need for disclosure, the risk caused by disclosure, and alternative methods of protection.

- *United States v. IBM Corp.,* 67 F.R.D. 40 (S.D.N.Y. 1975)

(2) A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.

- *Kewanee Oil Co. v. Bicron Corp.,* 416 U.S. 470, 94 S. Ct. 1870 (1974)

(3) The proponent of the privilege has the burden of showing a likelihood of competitive injury.

- *Gulf & Western Ind., Inc. v. United States,* 615 F.2d 527 (D.C. Cir. 1979)

(4) "Business strategy" has been accorded this privilege.

- *Parsons v. Jefferson-Pilot Corporation,* 141 F.R.D. 408 (M.D.N.C. 1992)

III. FEDERAL GOVERNMENT-RELATED PRIVILEGES

A. CONFIDENTIAL (OR "REQUIRED") REPORTS PRIVILEGE

1. Statement of the Federal Privilege

Where the confidentiality of information contained in reports required to be made to the government is provided by statute, a privilege against disclosure of the report may be asserted by the government or by the person submitting the report. The degree to which the privilege is qualified may be determined by the language of the statute.

2. General Principles of the Privilege

(1) The confidentiality requirement must be statutorily based.

- *Association for Women in Science v. Califano,* 566 F.2d 339, 344 (D.C. Cir. 1977)

(2) Supplemental assurances of confidentiality by the government are significant.

- *Califano*, 566 F.2d at 344

(3) The privilege is shared by the government and the reporting party.

- *Califano*, 566 F.2d at 347 ("It appears that the confidential report privilege . . . is shared by the reporter and the government. . . . In this case, the government has agreed to waive its 'share' of the privilege, and thus AWIS can obtain the Forms 474 from any consultant willing to release his or her form.")

(4) Many courts have considered the privilege qualified, but the strength of the particular statutory language may render the privilege absolute.

- *Baldridge v. Shapiro,* 102 S. Ct. 1103, 1113 (1982) (providing absolute privilege with regard to census data)

- *Gould, Inc. v. Mitsui Min. & Smelting Co., LTD,* 139 F.R.D. 244, 246 (D.D.C. 1991) (statutory language gave the Secretary of Commerce discretion to release otherwise confidential export license application. Though the secretary did not release the application, the court weighed interests in deciding to refuse discovery.)
- *Weiner v. NEL Electronics,* 848 F. Supp. 124, 128-9 (N.D. Cal. 1994) (statute that prohibits disclosures, but provides exceptions, gives rise to qualified privilege)

(5) "Housekeeping" statutes that address the confidentiality of a report only while it is in the hands of the agency may not confer any privilege.

- *Weiner v. NEL Electronics,* 848 F. Supp. 124, 128 (N.D. Cal. 1994)

(6) Examples of statutes providing for confidentiality of required reports.

- 49 U.S.C. § 1154(b) (reports of NTSB)
- 49 U.S.C. § 20903 (railroad accident reports)
- 13 U.S.C. § 9 (census)
- 42 U.S.C. § 2000e-8(e) (EEOC investigations)
- 35 U.S.C. § 122 (patent applications)
- 49 U.S.C. § 1154(b) (civil aviation accident reports)
- 26 U.S.C. § 6103 (tax return information)

B. DELIBERATIVE PROCESS PRIVILEGE

1. Statement of the Privilege

The government has a qualified privilege to withhold documents and other materials that would reveal intra-agency or inter-agency advisory opinions, recommendations or deliberations comprising part of a process by which governmental decisions and policies are formulated.

2. General Principles of the Privilege

(1) The purpose of the privilege is to enhance the quality of agency decisions, by protecting open and frank discussion among those who make them within the government.

- *Dept. of the Interior v. Klamath Water Users,* 121 S. Ct. 1060, 1065-66 (2001) (defining the privilege and stating its purpose)
- *In re Sealed Case,* 121 F.3d 729, 737 (D.C. Cir. 1997)

(2) The privilege does not protect against disclosure of factual material in a document unless its disclosure would reveal the deliberative process.

- *In re Sealed Case, supra,* 121 F.3d at 737
- *Texaco Puerto Rico v. Department of Consumer Affairs,* 60 F.3d 867, 885 (1st Cir. 1995)

(3) The privilege is qualified, in that it can be overcome by a sufficient showing of need. Factors to be considered in balancing competing interests include (1) the relevance of the evidence, (2) the availability of other evidence, (3) the seriousness of the issue, (4) the role of the government in the litigation, and (5) the possibility of future timidity by government employees resulting from disclosure.

- *In re Sealed Case, supra,* 121 F.3d at 737
- *Redland Soccer Club v. Dept. of the Army,* 55 F.3d 827, 854 (3d Cir. 1955)

(4) In order to be privileged, the information sought must be (1) predecisional, in that it pertains to the process leading up to the adoption of agency policy, and (2) deliberative, in that it is related to the process by which policies are formed.

- *In re Sealed Case,* 121 F.3d at 737
- *Natural Wildlife Federation v. United States Forest Service,* 861 F.2d 1114, 1117 (9th Cir. 1988)

(5) The privilege is derived from common law and the constitutional separation of powers.

- *In re Sealed Case,* 121 F.3d at 737 n.4

(6) The privilege covers documents created by non-employee consultants of an agency for the purpose of aiding the agency's deliberative process.

- *Dow Jones & Co. v. Department of Justice*, 917 F.2d 571, 575 (D.C. Cir. 1990)

(7) The privilege applies to the process of decision-making, not to decisions made.

- *Sterling Drug, Inc. v. F.T.C.,* 450 F.2d 698, 708 (D.C. Cir. 1971)

(8) Some courts have suggested that where the deliberative process is itself the issue, as where government misconduct is alleged, the privilege may not apply.

- *Dominian Cogen, D.C., Inc. v. District of Columbia, 878 F. Supp. 258, 268 (D.D.C. 1995)*

- *In re Sealed Case,* 121 F.3d at 737-8

C. BANK EXAMINATION PRIVILEGE

1. Statement of the Privilege

A government agency has a qualified privilege not to disclose opinions, conclusions or recommendations resulting from its examination of a financial institution that it is charged with regulating.

2. General Principles of the Privilege

(1) The privilege is closely related to both the deliberative process privilege and the confidential reports privilege, and its primary purpose is to encourage the flow of information to bank examiners and protect the quality of agency decision-making.

- *In re subpoena served upon the comptroller of the currency, 967 F.2d 630, 634 (D.C. Cir.* 1992)

- *Redland Soccer Club v. Dept. of the Army,* 55 F.3d 827, 853 n.18 (3d Cir. 1995)

(2) The privilege is qualified, being subject to the same weighing of interests as applies in the deliberative process privilege.

- *In re subpoena, 967 F.2d at 634*

(3) Like the deliberative process privilege, the bank examination privilege does not protect purely factual material.

- *In re subpoena, supra, 967 F.2d at 634*

D. INFORMATION PROVIDED TO THE GOVERNMENT UNDER A PLEDGE OF CONFIDENTIALITY

1. Statement of the Privilege

The government has a qualified privilege to withhold those portions of an investigative report or other evidence based upon and that would reveal information provided to the government by a private party pursuant to the government's pledge of confidentiality.

- *Machin v. Zuckert,* 316 F.2d 336, 339 (D.D.C. 1963)

- *United States v. Weber Aircraft,* 104 S. Ct. 1488, 1491-92 (1984)

2. General Principles of the Privilege

(1) The privilege applies where the disclosure would hamper the efficient operation of an important government program.

- *Machin,* 316 F.2d at 339

(2) The privilege is applicable whether or not the government is a party to the litigation, but it has its greatest force when the government is not a party.

- *Machin,* 316 F.2d at 339

(3) Portions of investigative reports that may be revealed without jeopardizing the future success of investigations, such as, in some cases, its purely factual findings, are not privileged.

- *Machin,* 316 F.2d at 340

(4) In order to be privileged, the information must have been obtained in large part through promises of confidentiality.

- *Badwahr v. United States Dept. of the Air Force,*829 F.2d 182, 184 (D.C. Cir. 1987) (distinguishing between, *e.g.*, a non-implicated mechanic working on a wreckage, whose statements would not be privileged, and those whose candor might depend on an assurance of non-disclosure)

E. CONFIDENTIAL INFORMANT PRIVILEGE

1. Statement of the Privilege

The government has a qualified privilege to withhold the identity of a person who has confidentially provided information to, or otherwise confidentially assisted, law enforcement officers in their investigation of possible violations of criminal or civil statutes.

- Supreme Court Standard 510
- *Rovario v. United States,* 77 S. Ct. 623 (1957)

2. General Principles of the Privilege

(1) The privilege applies in criminal and civil cases.

- *Brock v. On Shore Quality Control Specialists, Inc.,* 811 F.2d 282, 283 (5th Cir. 1987)

(2) The purpose of the privilege is to enhance law enforcement by preventing retaliation against informants. Hence, once the identity of an informant has been disclosed to those who would resent the communication, the privilege is lost.

- *Rovario,* 77 S. Ct. at 627
- *Brock,* 811 F.2d at 284

(3) The content of the informant's communication is privileged only if it would tend to reveal the identity of the informant.

- *Rovario,* 77 S. Ct. at 627

(4) The informant's communication must be confidential, but confidentiality may be implied.

- *United States Department of Justice v. Landano,* 113 S. Ct. 2014, 2019 (1993)
- *Cofield v. City of LaGrange,* 913 F. Supp. 608, 618 (D.D.C. 1996)

(5) The privilege is qualified, in that it may be overcome if the privileged information is essential to a fair determination of a case.

- *Rovario,* 77 S. Ct. at 628
- *Cofield,* 913 F. Supp. at 619

(6) The privilege protects the identity not only of persons who provide information to law enforcement officers, but also persons who otherwise assist officers in a law enforcement investigation.

- *Black v. Sheraton Corp. of America, 47* F.R.D. 263, 265 (D.D.C. 1969)

(7) In order for the privilege to apply, the informant need not have approached the government; it applies as well where the informant provided information only after being approached and interviewed by an officer.

- *Martin v. Albany Business Journal, Inc.,* 780 F. Supp. 927, 937 (N.D.N.Y. 1992)

F. LAW ENFORCEMENT INVESTIGATORY FILES PRIVILEGE

1. Statement of the Privilege

The government has a qualified privilege to withhold the content of an investigatory file compiled by a law enforcement agency.

- *Friedman v. Bache Halsey Stuart Shields, Inc.,* 738 F.2d 1336, 1341(D.D.C. 1984)
- *Kuehnert v. F.B.I.,* 620 F.2d 662, 666-7 (8th Cir. 1980)

2. General Principles of the Privilege

(1) In order to be covered by the privilege, materials need not have been created for the purpose of law enforcement; it is sufficient that they were gathered for that purpose.

- *John Doe Agency v. John Doe Corp.,* 110 S. Ct. 471, 476 (1989)

(2) In the Eighth Circuit, if the records comprise investigatory files of a criminal law enforcement agency, the government is entitled to the privilege without showing the law enforcement purpose of the particular investigation.

- *Kuehnert v. F.B.I.,* 620 F.2d 662, 666-7 (8th Cir. 1980)

(3) Some circuits require that there be a "rational nexus" between the file and a law enforcement purpose. Under this test, the government must identify a particular individual or incident as the object of the investigation, specify the potential violation of law or security risk, and show that the connection is based upon information sufficient to support a colorable claim of rationality.

- *Davin v. United States Dept. of Justice,* 60 F.3d 1043, 1056 (3d Cir. 1995)

(4) The privilege is qualified, and courts have developed balancing tests.

- *Friedman v. Bach Halsey Stuart Shields, Inc.,* 738 F.2d 1336, 1342-3 (D.C. Cir. 1984)

G. INVESTIGATIVE TECHNIQUES PRIVILEGE

The government has a qualified privilege to withhold information concerning confidential techniques, procedures or guidelines for law enforcement investigations or prosecutions .

- *Becker v. IRS,* 34 F.3d 398, 405 (7th Cir. 1994)
- *United States v. Van Horn,* 789 F.2d 1492, 1507 (11th Cir. 1986)

H. PRESIDENTIAL COMMUNICATIONS PRIVILEGE

The President has a qualified privilege to withhold from disclosure communications made by or solicited and received by the President or a member of the White House staff with significant responsibility for advising the President, pursuant to the performance of the President's responsibilities and made or received in the process of shaping policies or making decisions.

- *United States v. Nixon,* 94 S. Ct. 3090, 3107-11 (1974)
- *In re Grand Jury Proceedings,* 5 F. Supp.2d 21 (D.D.C. 1998)
- *Nixon v. Administrator of General Services,* 97 S. Ct. 2777, 2793 (1977)

I. JUDICIAL PRIVILEGE

There is a qualified privilege for confidential communications among a judge and the judge's staff regarding the performance of judicial duties.

- *Matter of Certain Complaints under Investigation*, 783 F.2d 1488, 1518-19 (11th Cir. 1986)

J. SPEECH OR DEBATE CLAUSE PRIVILEGE

A United States Senator or Representative has a privilege under the Speech or Debate Clause of the Constitution against inquiry into or introduction of evidence of legislative acts or the motivation for legislative acts of the legislator or his or her aide that occurred in the regular course of the legislative process.

- *United States v. Helstoski,* 99 S. Ct. 2432, 2440 (1975)
- *Gravel v. United States,* 92 S. Ct. 2614 (1972)

IV. ADDITIONAL PRIVILEGES UNDER MISSOURI LAW

A. _PHYSICIAN-PATIENT PRIVILEGE

1. Statement of the Privilege

Section 491.060 RSMo:

> The following persons shall be incompetent to testify:
>
> ***
>
> (5) A physician licensed pursuant to chapter 334, RSMo, a chiropractor licensed pursuant to Chapter 331, RSMo, a licensed psychologist or a dentist licensed pursuant to chapter 332, RSMo, concerning any information which he or she may have acquired from any patient while attending the patient in a professional character, and which information was necessary to enable him or her to prescribe and provide treatment for such patient as a physician, chiropractor, psychologist or dentist.

2. General Principles

(1) The privilege does not or might not apply with respect to certain proceedings:

a. Court ordered examinations. Rule 60.01;

b. Alcohol test results otherwise admissible in criminal actions arising out of acts allegedly committed by intoxicated drivers. *State v. Trice,* 747 S.W.2d 243 (Mo. App. 1988); § 577.037.1, RSMo;

c. Public records such as death certificates.

d. Information communicated to a medical professional in the course of an effort to obtain most controlled substances. §195.260, RSMo;

e. Situations involving child abuse or neglect. *Roth v. Roth,* 793 S.W.2d 590 (Mo. App. 1990); *State ex rel. D.M. v. Hoester,* 681 S.W.2d 449 (Mo. App. 1984);

f. Any proceeding for the termination of parental rights. §211.459(4), RSMo;

g. Proceedings under the Uniform Parentage Act. §210.832.3, RSMo. § 210.839.1, RSMo;

h. Worker's compensation cases. § 287.140.5, RSMo;

i. Guardianship and conservator proceedings where prima facie proof of incapacity or disability has been made. *In re Estate of Moormann,* 709 S.W.2d 160 (Mo.App. 1986);

j. Civil detention proceedings. § 632.425, RSMo;

k. Will contests. *Spurr v. Spurr,* 226 S.W.2d 35 (Mo. 1920);

l. Medical malpractice cases. *Cramer v. Hurt,* 755 S.W.2d 258 (Mo. 1990);

m. Cases where a hospital is seeking to determine the qualifications of a staff physician. *Klinge v. Lutheran Medical Center of St. Louis,* 518 S.W.2d 157 (Mo. App. 1974).

(2) The physician-patient privilege can be waived by the patient.

- *McClelland v. Ozenberger,* 805 S.W.2d 227 (Mo. App. 1991)

(3) The physician-patient privilege is waived by placing one's mental or physical condition at issue in a civil or criminal action.

- *McClelland, supra; State ex rel. Hayter v. Griffin,* 785 S.W.2d 590 (Mo. App. 1990)
- *State ex rel. Wilfong v. Schaeperkoetter,* 933 S.W.2d 407, 409 (Mo. banc 1996)

(4) The privilege applies to persons assisting or acting under the direction of the named professionals.

(5) The privilege belongs to the patient. The privilege must be claimed by the patient or by the patient's representative on the patient's behalf.

- *State v. Evans*, 802 S.W.2d 507 (Mo. App. 1991)

(6) The privilege is to be strictly construed against non-disclosure.

- *Rodriguez v. Suzuki Motor Corp.,* 996 S.W.2d 47, 61-2 (Mo. banc 1999)

(7) This privilege applies in both civil and criminal cases.

- *State v. Evans, supra*

(8) The privilege does not apply if the purpose of the communication was not to seek medical assistance or treatment.

- *State ex rel. Hayter v. Griffin,* 785 S.W.2d 590 (Mo. App. 1990)
- *State v. Henderson,* 824 S.W.2d 445 (Mo. App. 1991)

(9) The physician-patient privilege is waived when the patient files suit seeking recovery for personal injuries, but only with respect to communications or records that reasonably relate to the claim.

- *State ex rel. McNutt v. Keet,* 432 S.W.2d 597 (Mo. banc 1968)
- *State ex rel. Stufflebam v. Applequist,* 694 S.W.2d 882 (Mo. App. 1985)
- *Rodriguez v. Suzuki Motor Corp.,* 996 S.W.2d 47, 63 (Mo. banc 1999)

(10) The privilege is not negated merely by the fact that another party places the patient's physical or health condition at issue. Nor does assertion of the defense of comparative negligence waive the defendant's physician-patient privilege, even where the defendant's condition may be relevant to the defense.

- *Rodriguez v. Suzuki Motor Corp.,* 996 S.W.2d at 63-4
- *State ex rel. Hayter v. Griffin,* 785 S.W.2d 590 (Mo. App. 1990)

(11) The privilege is statutory, and may be conditioned by statute.

- *State ex re. DM v. Hoester,* 681 S.W.2d 449, 450 (Mo. 1984)

(12) The privilege extends to hospital and medical records.

- *Rodriguez v. Suzuki Motor Corp.,* 996 S.W.2d 47, 61-2 (Mo. banc 1999)

(13) The privilege applies only where the information or test results sought were necessary to the treatment of the patient. In most instances, the plaintiff's burden of proving this is satisfied by showing that the records sought were compiled in the course of treatment. This is not true of blood alcohol tests, to which no such presumption applies.

- *Rodriguez v. Suzuki Motor Corp.,* 996 S.W.2d 47, 62 (Mo. banc 1999)

(14) A defendant may not require a medical authorization form that authorizes disclosure beyond the information at issue under the pleadings, and a plaintiff may not require an admonition to the health-care provider to avoid discussion of information not relevant to the injuries at issue.

- *State ex rel. Jones v. Slyer,* 936 S.W.2d 805, 807-9 (Mo. banc 1997)

B. ACCOUNTANT-CLIENT PRIVILEGE

1. Statement of the Privilege

Section 326.151, RSMo:

> A licensee [accountant] shall not be examined by judicial process or proceedings without the consent of the licensee's client as to any communication made by the client to the licensee in person or through the media of books of account and financial records, or the licensee's advice, reports or working papers given or made thereon in the course of professional employment, nor shall a secretary, stenographer, clerk or assistant of licensee, or a public accountant, be examined, without the consent of the client concerned, regarding any fact the knowledge of which he or she has acquired in his or her capacity. This privilege shall exist in all cases except when material to the defense of an action against a licensee.

2. General Principles

(1) An exception to the accountant-client privilege exists when the client brings an action against the accountant.

- *State ex rel. Schott v. Foley*, 741 S.W.2d 111, 113 (Mo. App. 1987)
- *Southwestern Bell Publications v. Ryan,* 754 S.W.2d 30 (Mo. App. 1988)

(2) The accountant-client privilege is waived when the client places its financial condition at issue in litigation, and does not arise in any action against the accountant, whether or not brought by the client.

- *Southwestern Bell Publications v. Ryan,* 754 S.W.2d 30 (Mo. App. 1988)

C. INSURER-INSURED PRIVILEGE

1. Statement of the Privilege

The attorney-client privilege applies to confidential communications from an insured to its liability insurer regarding the subject matter of a claim or potential claim against the insured, where the insured has delegated to the insurer its defense and the selection of an attorney.

- *State ex rel. Cain v. Barker*, 540 S.W.2d 50 (Mo. banc 1976)

2. General Principles

(1) The privilege does not apply to statements relating to coverage and not to the defense of a claim against the insured.

- *Truck Ins. Exch. v. Hunt,* 590 S.W.2d 425 (Mo. App. 1979)
- *American Family Mut. Ins. Co. v. Brown,* 631 S.W.2d 375, 378 (Mo. App. 1982)

(2) The relationship between an insured and its property and casualty insurer does not give rise to the privilege, at least before the insurer acknowledges coverage.

- *State ex rel. J. E. Dunn Const. Co. v. Sprinkle,* 650 S.W.2d 707 (Mo. App. 1983)

D. SOME ADDITIONAL SPECIFIC STATUTORY PRIVILEGES IN MISSOURI

1. Counselor-Patient Privilege

Section 337.540, RSMo:

> Any communication made by any person to a licensed professional counselor in the course of professional services rendered by the licensed professional counselor shall be deemed a privileged communication and the licensed professional counselor shall not be examined or be made to testify to any privileged communication without the prior consent of the person who received his professional services, except in violation of the criminal law.

2. Arbitration, Conciliation, Mediation or Other Alternative Dispute Resolution Proceedings

Section 435.014, RSMo:

> 1. If all the parties to a dispute agree in writing to submit their dispute to any forum for arbitration, conciliation or mediation, then no person who serves as arbitrator, conciliator or mediator, nor any agent or employee of that person, shall be subpoenaed or otherwise compelled to disclose any matter disclosed in the process of setting up or conducting the arbitration, conciliation or mediation.
>
> 2. Arbitration, conciliation and mediation proceedings shall be regarded as settlement negotiations. Any communication relating to the subject matter of such disputes made during the resolution process by any participant, mediator, conciliator, arbitrator or any other person present at the dispute resolution shall be a confidential communication. No admission, representation, statement or other confidential communication made in setting up or conducting such proceedings not otherwise discoverable or obtainable shall be admissible as evidence or subject to discovery.

Missouri Supreme Court Rule 17.06:

> (a) An alternative dispute resolution process undertaken pursuant to this Rule 17 shall be regarded as settlement negotiations. . . . No admission, representation, statement or other confidential communication made in setting up or conducting such process shall be admissible as evidence or subject to discovery, ...
>
> (b) No individual or organization providing alternative dispute resolution services pursuant to this Rule 17 or any agent or employee of the individual or organization shall be subpoenaed or otherwise compelled to disclose any matter disclosed in the process of setting up or conducting the alternative dispute resolution process.

- *Kenney v. Emge,* 972 S.W.2d 616, 621 (Mo. App. 1998) (under the statute and rule, it was error to require a mediator to appear)

- *State ex rel. Webster v. Douglas Toyota,* 830 S.W.2d 491, 495 (Mo. App. 1992) (arbitration pursuant to consent injunction requiring arbitration should be regarded as settlement negotiations under § 435.014.2)

3. Medical Peer Review Committees

Section 537.035.2.4, RSMo.:

> Except as otherwise provided in this section, the interviews, memoranda, proceedings, findings, deliberations, reports, and minutes of peer review committees, or the existence of the same, concerning the health care provided any patient are privileged and shall not be subject to discovery, subpoena, or other means of legal compulsion for their release to any person or entity or be admissible into evidence in any judicial or administrative action for failure to provide appropriate care.

- *State ex rel. Faith Hospital v. Enright*, 706 S. W.2d 852 (Mo. banc 1986)

- *State ex rel. St. Johns Mercy Medical Center v. Hoester*, 708 S. W.2d 796 (Mo. App. 1986)

- The peer review privilege does not apply in an action by the peer review committee or the entity that formed it to restrict or revoke privileges or a license, or in an action against a member of the peer review committee or the entity that formed it arising from a restriction or revocation of privileges or a license.

Section 537.035.2.4, RSMo.:

- *State ex rel. Health Midwest Development Group v. Daugherty,* 965 S.W.2d 841, 843 (Mo. banc 1998)

4. Juvenile Proceedings

Section 211.271.3, R.S. Mo.:

> After a child is taken into custody as provided in Section 211.131, all admissions, confessions, and statements by the child to the juvenile officer and juvenile court personnel and all evidence given in cases under this chapter, as well as all reports and records of the juvenile court, are not lawful or proper evidence against the child and shall not be used for any purpose whatsoever in any proceeding, civil or criminal, other than proceedings under this chapter.

- The privilege may be defeated by presence of a third party. *State v. Thomas*, 698 S.W.2d 942 (Mo. App. 1985)

- The prohibition against use of the communications is intended exclusively for the benefit of the juvenile. The communications may be used in a civil action between other persons, or for impeachment of the juvenile in the criminal trial of another person. *Smith v. Harold's Supermarket*, 685 S.W.2d 859 (Mo. App. 1984); *State v. Russell*, 625 S. W.2d 138 (Mo. banc 1981)

V. WORK PRODUCT IMMUNITY

A. STATEMENT OF THE DOCTRINE

1. Ordinary Work Product

A party to litigation may not discover from another party to the same litigation, or require the other party to produce at trial, or require the other party to reveal the content of, any document or other tangible thing prepared by or for the other party or by or for the other party's representative, in anticipation of any past, current or future litigation, unless:

(1) the party seeking the disclosure shows that it has a substantial need for the materials in the preparation of its case, and is unable without undue hardship to obtain the substantial equivalent of the materials by other means, or

(2) the party is seeking the disclosure from an attorney who represented the party in the matter in which the work product was prepared, or

(3) the work product bears a close relationship to a scheme by the other party to commit a crime or fraud, or

(4) the state of mind of the other party is at issue, and the work product bears directly on the state of mind, or

(5) the other party has waived the immunity by (a) allowing an expert witness designated for trial to consider the materials; (b) using the materials to refresh a witness's memory; or (c) disclosing the materials to (i) the opposing party, (ii) another adversary, or (iii) a non-adversarial third party in a manner that makes it likely that the opposing party will discover the substance of the materials.

2. Opinion Work Product

A party to litigation may not discover, or require the disclosure of at trial, the mental impressions, conclusions, opinions or legal theories of another party to the same litigation, or its attorney or other representative, developed in anticipation of any past, current or future litigation. The immunity is accorded greater deference than ordinary work product immunity. However, opinion work product may be subject to disclosure if:

(1) the party is seeking the disclosure from an attorney who represented the party in the matter in which the work product was developed; or

(2) the work product bears a close relationship to a scheme by the other party to commit a crime or fraud; or

(3) the state of mind of the other party is at issue, and the work product hears directly on the state of mind; or

(4) the other party has waived the immunity by (a) allowing an expert witness designated for trial to consider the work product; (b) using the work product to refresh a witness's memory; or (c) disclosing the work product to (i) the opposing party, (ii) another adversary, or (iii) a non-adversarial third party in a manner that makes it likely that the opposing party will discover the substance of the work product.

B. GENERAL PRINCIPLES OF WORK PRODUCT IMMUNITY

1. In federal court, work product immunity is determined by federal law.

- *Baker v. General Motors Corp.,* 209 F.3d 1051, 1053 (8th Cir. 2000)

2. The work product doctrine applies in civil and criminal cases.

- *U.S. v. Nobles,* 95 S. Ct. 2160, 2169 (1975)

3. The work product doctrine, insofar as it applies to discovery in civil cases, is stated in part in Rule 26(b)(3) of the Federal Rules of Civil Procedure.

Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule [dealing with experts], a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

4. While tangible work product is governed by Rule 26(b)(3), intangible work product, such as an attorney's thought process, is also protected.

- *Hickman v. Taylor*, 67 S. Ct. 385 (1947)

- *American Floral Services v. Florists' Transworld Delivery Ass'n*, 107 F.R.D. 258, 260 (N.D. Ill. 1985)

5. The purpose of the doctrine is to protect the adversarial process, by allowing an attorney a degree of privacy in preparing for litigation, by eliminating a disincentive to reduce thoughts to writing, by encouraging thorough investigation and case development, and by discouraging "inefficiency, unfairness and sharp practices." However, it is designed to balance the need to promote attorney preparation against society's interest in having all material facts relevant to the resolution of a dispute revealed.

- *In re Murphy*, 560 F.2d 326, 333 (8th Cir. 1977)
- *Hickman v. Taylor*, 67 S. Ct. 385, 393-4 (1947)
- *Pamida, Inc. v. E.S. Originals, Inc.*, 281 F.3d 726, 732 (8th Cir. 2002) (balancing)

6. In order to have been prepared "in anticipation of litigation" for the purpose of the work product doctrine, the work product must have been developed because of the prospect of litigation, and it must have been such as would not have been prepared in the ordinary course of business. Suit need not have been filed, but a remote possibility of litigation is insufficient.

- *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 401-2 (8th Cir. 1987) (quoting Wright & Miller for this rule, and holding that while an insurer's individual case reserves calculated by its attorneys are protected work product because they reveal the attorneys' mental impressions, the aggregate reserve figures are not protected, because they do not reveal the mental impressions)
- *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 604 (8th Cir. 1977) (quoting from Wright & Miller) (emphasis added):

> . . . Prudent parties anticipate litigation, and begin preparation prior to the time suit is formally commenced. Thus the test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation. But the converse of this is that even though litigation is already in prospect, there is no work product immunity for documents prepared in the regular course of business rather than for purposes of the litigation.

- *McFadden v. Norton Co.*, 118 F.R.D. 625, 630-32 (D. Neb. 1988) (accident report by marketing manager prepared at request of corporate counsel after receiving notice of subrogation claim was not covered by work product immunity under the Eighth Circuit test, because it was prepared not in anticipation of litigation, but rather to determine whether to resist the claim. The attorney's affidavit stating that such notices "almost always" lead to litigation was ineffective without supporting facts. The court also noted the absence of evidence that the investigator was apprised of legal issues, or any particular factual determinations that had to be made to preserve the defendant's trial position.)
- *Occidental Chemical Corp. v. OHM Remediation Services Corp.*, 175 F.R.D. 431, 435 (W.D.N.Y. 1997) (applying the same Wright & Miller test applied by the Eighth Circuit, the court held that even if prepared while anticipating litigation, documents are not immune from discovery if they would have been created anyway in the ordinary course of business)
- *Ring v. Commercial Union Ins. Co.*, 159 F.R.D. 653, 156 (M.D.N.C. 1995) (the general rule in first-party insurance claims is that only documents generated after claim denial may be deemed

prepared in anticipation of litigation. Immunity can apply to documents created before that only if the insurer presents specific proof demonstrating a resolve to litigate. In the case of third-party claims, litigation may be deemed anticipated before denial.)

- *Airheart v. Chicago & North Western Transp. Co.*, 128 F.R.D. 669, 671 (D.S.D. 1989) (insurer's investigation done pursuant to contractual obligation to the insured is not work product)

- *United States v. Roxworthy*, 457 F.3d 590, 593-600 (6th Cir. 2006) (for a document to be deemed prepared because of the prospect of litigation, it must have been created because of a subjective anticipation of litigation, and the subjective anticipation must have been objectively reasonable; it will not be protected if it would have been prepared in substantially the same manner irrespective of the anticipation of litigation)

7. Documents prepared in anticipation of arbitration qualify as work product.

- *Samuels v. Mitchell,* 155 F.R.D. 195, 200 (N.D. Cal. 1994)

8. Materials prepared in anticipation of an *ex parte* proceeding may be deemed work product, if there is an adversarial feature to the proceeding.

- *McCook Metals v. Alcoa, Inc.,* 192 F.R.D. 242, 260-62 (N.D. Ill. 2000) (while documents prepared for a patent application are not accorded work product immunity, documents prepared in anticipation of an appeal to the Board of Patent Appeals and Interferences are, because even though it is an *ex parte* proceeding, it is adversarial in nature)

9. Ordinarily work product includes raw factual information. Opinion work product contains a party's attorney's or agent's mental impressions, conclusions, opinions and legal theories.

- *Moore v. R.J. Reynolds Tobacco Co.,* 194 F.R.D. 659, 662 (S.D. Iowa 2000)

10. Neither ordinary nor opinion work product has to be created by or under the direction of an attorney to be subject to work product immunity.

- *Duplan Corp. v. Deering Milliken, Inc.*, 540 F.2d 1215, 1219 (4th Cir. 1976) ("opinion work product now applies equally to lawyers and non-lawyers alike")

- *In re Dayco Corp. Derivative Securities Litigation*, 102 F.R.D. 468, 470 (S.D. Ohio 1984) (diary compiled by defendant's employee at the direction of counsel, including chronology of past events and contemporaneous account of current events was immune work product)

- *Canal v. Lincoln Nat. Bank*, 179 F.R.D. 224, 225-27 (N.D. Ill. 1998) (a memorandum of a bank officer, prepared at the direction of another officer, analyzing methods by which stock might be valued for purpose of minority shareholder suit, was subject to work product immunity. The court stressed that the author was not involved in the merger at issue, but did not explain how that affected the decision.)

- *In re Ford Motor Co.*, 110 F.3d 954, 967 (3d Cir. 1997) (work product of technical consultant of attorney was immune)

11. Ordinary work product immunity may be overcome by showing (1) a substantial need of the materials, and (2) the inability without undue hardship to obtain the substantial equivalent of the materials by other means. The standard is subjective, but generally hinges on the importance of the information sought and whether the work product resulted from a unique access to the information.

- *Rackers v. Siegfried,* 54 F.R.D. 24, 25-6 (W.D. Mo. 1971) (an insurance adjuster's measurement of skid marks right after an accident qualified for this exception because the plaintiff's observation at the time of the accident could not approximate the precision of the measurement)

- *American Standard, Inc. v. Bendix Corp.,* 71 F.R.D. 443, 447-8 (W.D. Mo. 1976) (allowing access to transcripts of plaintiff's interviews of its employees because the information was no longer available as the result of the passage of time)

- *Baker v. General Motors Corp.,* 209 F.3d 1051, 1054 (8th Cir. 2000) (a party cannot show substantial need for witness statement if the witness is available to the party, or if the evidence sought would only corroborate other evidence)

- *Zoller v. Conoco, Inc.,* 137 F.R.D. 9, 10 (W.D. La. 1991) (photographs taken by defendant's investigator, through work product, were subject to production because the accident scene changed after the accident)

- *Martin v. Bally's Park Place Hotel,* 983 F.2d 1252, 1262-3 (3d Cir. 1993) (OHSA did not meet undue hardship standard for obtaining defendant's consultant's report on dishwasher safety, since there was evidence that the defendant would have reinstalled the machine to allow OHSA to test it, and because OSHA's lack of resources for testing does not meet the standard)

12. Opinion work product is not subject to the substantial need /undue hardship exception. At least with respect to an attorney's work product, opinion work product "enjoys a nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances."

- *In re Murphy,* 560 F.2d 326, 336 (8th Cir. 1977) (because an attorney's thoughts are "inviolate," opinion work product enjoys nearly absolute protection)

- *Baker v. General Motors Corp.,* 209 F.3d 1051, 1054 (8th Cir. 2000) (Opinion work product includes counsel's mental impressions, conclusions, etc. It enjoys nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances, such as when the material demonstrates that an attorney engaged in illegal conduct or fraud.)

13. Work product status generally does not apply to documents received from a third party.

- *Bohannon v. Honda Motor Co.,* 127 F.R.D. 536, 539 (D. Kan. 1989)

14. There is a "selection and compilation" exception to the general principle that work product immunity does not apply to third-party documents acquired by a party. An attorney's selection of documents from a body of documents may be work product because it reflects the attorney's mental impressions, and any testimony of counsel that would reveal what documents were selected, including in some cases testimony as to the existence of documents, is protected by work product immunity. Some courts construe this "selection and compilation" exception restrictively.

- *Shelton v. American Motors Corp.*, 805 F.2d 1323, 1329 (8th Cir. 1986)
- *In re Grand Jury Subpoenas,* 318 F.3d 379, 386 (2d Cir. 2003) (specific showing of mental processes exposed must be made)

15. The recollections, notes and memoranda of an attorney or his agent from a witness interview are generally deemed opinion work product.

- *Baker v. General Motors*, 209 F.3d 1051, 1054 (8th Cir. 2000)
- *In re Sealed Case,* 856 F.2d 268, 273 (D.C. Cir. 1988) (as the work product sought was based on oral statements of witnesses, a far stronger showing is required than the substantial need/undue hardship standard)
- *Estevez v. Matos,* 125 F.R.D. 28, 31-2 (S.D.N.Y. 1989) (in slip and fall case, apartment occupant's statement given to defendant's was subject to discovery under the Rule 26(b)(3) substantial need/undue hardship standard, because there was little suggestion that the statement reflected defendant's mental impressions, the witness's credibility was in question, and her deposition testimony was confused and showed lack of recollection)

16. Even if it is work product, a statement about the subject matter of an action must be produced upon request to the party or other person who made the statement, if the statement is signed or otherwise adopted by the person who made it, or is stenographically or otherwise recorded in a way that makes it a substantially verbatim contemporaneously recorded statement. A statement of an employee is discoverable by the employer if it would be admissible as a vicarious admission under F.R.E. 801(d)(2)(D) (i.e., it is made during employment and concerns a matter within the scope of employment).

- Fed. R. Civ. P. 26(b)(3)
- *Continental Grain Co. v. Systems Erectors, Inc.,* 103 F.R.D. 605, 606 (S.D. Ill. 1984)

17. A litigation adversary may not circumvent the work product immunity accorded to statements taken from non-party witnesses by using the subpoena power to require a witness to acquire his statement pursuant to Fed. R. Civ. P. 26(b)(3) and produce it.

- *In re Convergent Technologies Securities Litigation,* 122 F.R.D. 555, 560-64 (N.D. Cal. 1988)

18. Work product does not protect against the disclosure of facts learned in anticipation of litigation, or the identity of persons from when the facts were learned, or the existence of documents.

- *Barrett Industrial Trucks, Inc. v. Old Republic Ins. Co.,* 129 F.R.D. 515, 518-19 (N.D. Ill. 1990)
- *In re Convergent Technologies Securities Litigation,* 122 F.R.D. 555, 558 (N.D. Cal. 1988)

19. There is an exception to the work product doctrine for ongoing crime and fraud, similar to that applicable to the attorney-client privilege. Where the ongoing crime or fraud is exclusively that of the client, the attorney may retain the right to assert opinion work product immunity.

- *In re Grand Jury Subpoenas,* 144 F.3d 653, 660 (10th Cir.1998)
- *In re Murphy,* 560 F.2d 326, 336 n.19 (8th Cir. 1977)
- *In re Sealed Case,* 107 F.3d 46, 52 (D.C. Cir. 1997)
- *In re Special September 1978 Grand Jury,* 640 F.2d 49, 63 (7th Cir. 1980) (attorney retains right to opinion work product immunity)

20. In order to establish the crime-fraud exception to opinion work product immunity on the basis of a client's conduct, the party seeking discovery has the burden of showing that (1) the client was engaged in or planning a criminal or fraudulent scheme when he sought the advice of counsel to further the scheme , and (2) the documents containing the attorney's opinion work product bear a close relationship to the scheme.

- *In re Murphy,* 560 F.2d 326, 338 (8th Cir. 1977) (stating that this would be the test if such an exception Is recognized)

21. The beneficiaries of a fiduciary are not entitled to the work product arising from an attorney's representation of the fiduciary in anticipation of litigation with the beneficiaries.

- *In re International Systems & Controls Corp. Securities Litigation*, 693 F.2d 1235, 1239 (5th Cir. 1982)
- *Wildbur v. Arco Chemical Co.*, 974 F.2d 631, 646 (5th Cir. 1992)
- *Sandberg v. Virginia Bankshares, Inc.*, 979 F.2d 332, 355 n. 22 (4th Cir. 1992)

22. A person is entitled to the work product created by his attorney pursuant to the attorney's representation of the person. A subsequent adversity of interest between the attorney and client, and termination of the attorney-client relationship, does not alter this.

- *Spivey v. Zant,* 683 F.2d 881, 885 (5th Cir. 1992)
- *Gottlieb v. Wiles,* 143 F.R.D. 241 (D. Colo. 1992)

23. To the extent that the state of mind of a party is at issue in a case, work product reflecting the state of mind may be deemed not subject to work product immunity or to be discoverable because of substantial need and an inability to obtain the substantial equivalent.

- *Central National Ins. Co. v. Medical Protective Co.,* 107 F.R.D. 393, 395 (E.D. Mo. 1985) (excess liability insurer bringing bad faith failure to settle claim against insurer was entitled to documents embodying opinion and ordinary work product produced during settlement negotiations, because "such communications were at the heart of its claim.")
- *Walters v. State Farm Mutual Auto Ins. Co.,* 141 F.R.D. 307, 308-9 (D. Mont. 1990) (in bad faith action by insured, insured was entitled to opinion work product in claim file because its content was directly at issue in the case. The ordinary work product was subject to the substantial need/undue hardship exception)
- *Charlotte Motor Speedway, Inc. v. International Ins. Co.,*125 F.R.D.127,129-31 (M.D.N.C. 1989) (there is an exception to opinion work product immunity where the activities and advice of counsel are directly at issue)
- *American Standard, Inc. v. Bendix Corp.,* 80 F.R.D. 906, 708-10 (W.D. Mo. 1978) (discovery of ordinary and attorney opinion work product, as well as confidential attorney-client communications, is permissible where plaintiff sought to avoid statute of limitations by claiming that it did not discover fraud until it was discovered by plaintiff's attorney)
- *Duplan Corp. v. Moulinage et Retorderie de Chavanoz,* 509 F.2d 730, 733-4 (4th Cir. 1974) (the mandate in Rule 26(b)(3) that the court shall protect opinion work product from disclosure means that no showing of relevance or need can overcome the immunity. The court will not recognize an exception where opinion work product becomes an "operative fact" in a subsequent action.)

24. In most circuits, both the client and the attorney have standing to assert the immunity of the attorney's work product, although the attorney may not assert the immunity against the client.

- *In re Sealed Case*, 29 F.3d 715, 718 (D.C. Cir. 1994)
- *RTC v. H__ P.C.*, 128 F.R.D. 647, 649 (N.D. Tex. 1989)
- *Spivey v. Zant*, 683 F.2d 881, 885 (5th Cir. 1982) ("[T]he work product doctrine does not apply to the situation in which a client seeks access to documents . . . created or amassed by his attorney during the course of the representation.")

25. If the client chooses to waive the immunity for an attorney's work product, the attorney may contest the waiver, although the attorney's standing in this situation may be limited to his opinion work product.

- *In re Grand Jury Proceedings,* 604 F.2d 798, 801 (3d Cir. 1981)
- *Catino v. Travelers Ins. Co., Inc.*, 136 F.R.D. 534, 539 (D. Mass. 1991)

26. Waiver of the attorney-client privileged status of a communication does not necessarily constitute a waiver of applicable work product immunity. While any voluntary disclosure may waive the attorney-client privilege, only disclosures that are inconsistent with the adversary system waive work product immunity.

- *Chubb Integrated Systems v. National Bank*, 103 F.R.D. 52, 63 (D. D.C. 1984)

27. Inadvertent disclosure of work product to an opposing party will not necessarily constitute a waiver. Generally, waiver requires a voluntary disclosure.

- *Gundaker v. Unisys Corp.,* 151 F.3d 842, 848 (8th Cir. 1998) (inadvertent disclosure to opposing party does not waive immunity)
- *In re Grand Jury,* 138 F.3d 978, 981 (3d Cir. 1998) (applying balancing test for inadvertent disclosures)
- *Transamerica Computer Co. v. IBM,* 573 F.2d 646, 651 (9th Cir. 1978)

28. Voluntary disclosure of work product to an opposing party waives its immunity. Voluntary disclosure of work product to one adversary may constitute a waiver of work product immunity as to other adversaries, even if the disclosure occurs in settlement negotiations with the first adversary and a confidentiality agreement prevents disclosure by the first adversary. Voluntary disclosure to a non-adversarial third party waives immunity only if the disclosure is inconsistent with keeping the work product from the opposing party. This occurs where the disclosure substantially increases the likelihood that the opposing party will receive the work product.

- *Norton v. Cinemark, Inc.,* 20 F.3d 330 339 (8th Cir. 1994) (disclosure to opposing party waives objection to admissibility at trial on the ground of work product immunity)
- *United States v. Massachusetts Inst. of Technology,* 129 F.3d 681, 687 (1st Cir. 1997) (inconsistency standard)
- *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.,* 160 F.R.D. 437, 448 (S.D.N.Y. 1995) (substantial increase in likelihood standard)
- *In re John Doe,* 662 F.2d 1073, 1081-2 (4th Cir. 1981) ("[T]o effect a forfeiture of work product protection by waiver, disclosure must occur in circumstances in which the attorney cannot reasonably expect to limit the future use of the otherwise protected material." Hence, the existence of a confidentiality agreement is significant.)

- *In re Chrysler Motor Corp. Overnight Evaluation Program Litigation,* 860 F.2d 844, 846-7 (8th Cir. 1988) (class action defendant waived work product protection by providing work product to class counsel during settlement negotiations pursuant to non-disclosure agreement, and court could order class counsel to turn documents over to U.S. Attorney.)

- *Westinghouse Electric Corp. v. Republic of the Philippines,* 951 F.2d 1414, 1427-31 (3d Cir. 1991) (if target of government investigation discloses work product to investigating agency, even pursuant to non-disclosure agreement, work product immunity is waived as to other adversaries. Expectation of confidentiality does not preserve immunity when disclosure is made to an adversary)

29. Disclosure of work product to an adversary generally waives work product only as to the items actually disclosed; however, a self-serving partial disclosure may result in subject-matter waiver of work product.

- *Pittman v. Frazer,* 129 F.3d 983, 988 (8th Cir. 1997) (broad concepts of subject-matter waiver are inappropriate when applied to Rule 26(b)(3): "Disclosure to an adversary waives work product protection as to items actually disclosed.")

- *In re Sealed Case,* 676 F.2d 793, 818-825 (D.C. Cir. 1982) (voluntary disclosure of certain self-serving work product immune documents to the SEC in its investigation waived immunity as to other attorney work product)

30. Work product immunity is waived if the work product is considered by an expert designated as a witness. Some courts hold that this is not true of opinion work product.

- The [expert] report is to disclose the data and other information considered by the expert and any exhibits or charts that summarize or support the expert's opinions. Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions--whether or not ultimately relied upon by the expert--are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.

  Advisory Committee Notes, 1993 Amendment, Fed. R. Civ. P. 26(a)(2)
  (emphasis added)

- *Johnson v. Gmeinder,* 191 F.R.D. 638, 645-6 (D. Kan. 2000) (any type of work product, including materials prepared by non-testifying expert, loses immune status if considered by testifying expert)

- *Maynard v. Whirlpool Corp.,* 160 F.R.D. 85, 87-8 (S.D. W. Va. 1995) (conveyance of an attorney's opinion work product to an expert does not waive immunity, and so opposing counsel may not ask the expert whether counsel expressed dissatisfaction with the expert's opinions)

31. If work product is used by a witness to refresh his memory in the course of testifying, pursuant to F.R.E. 612, the portion relied upon must be produced to the adverse party. If work product is used by a witness to refresh his memory before testifying, it may be subject to production.

- *Erlich v. Howe,* 848 F. Supp. 482, 492-94 (S.D.N.Y. 1994)

- *Nutramax Laboratories, Inc.,* 183 F.R.D. 458, 471-2 (D. Md. 1998) (in light of circumstances of the case, the use of documents selected by counsel to prepare a witness for deposition constituted a testimonial use of the documents which resulted in a waiver of work product immunity as to the documents)

- *James Julian, Inc. v. Raytheon Co.,* 93 F.R.D. 138, 144-46 (D. Del. 1982) (binder of documents containing ordinary or work product, given to witnesses before their depositions, had to be produced. If the documents contained opinion work product, the balance might be different.)

32. An implied waiver of work product immunity may be found when the interests of fairness and consistency mandate a finding of waiver, including when a party seeks an advantage from its control over work product that is inconsistent with a healthy adversary system.

- *Pamida, Inc. v. E.S. Originals,* 281 F.3d 726, 732 (8th Cir. 2002) (implied waiver found because without it, defendant in indemnification action would be denied access to critical information known only to attorneys who defended the plaintiff in the underlying previous action)

33. Some courts have held that work product immunity applies only where the party seeking the work product is an adversary of the party on whose behalf the work product was developed.

- *Foster v. Hill,* 188 F.3d 1259, 1272 (10th Cir. 1999) (attorney may not withhold from client's trustee in bankruptcy work product produced in anticipation of pre-bankruptcy lawsuits, because the trustee is not an adversary in the bankruptcy or the lawsuits.)

34. Work product developed by or for a person in anticipation of one action is immune from discovery in another action in which the person is a party. This does not depend on the identities of the opposing parties or the temporal relation of the actions, and in the view of most courts, does not depend on whether the issues in the actions are related.

- *In re Murphy*, 560 F.2d 326, 334-5 (8th Cir. 1977)

- *FTC v. Grolier, Inc.*, 103 S. Ct. 2209, 2213 (1983)

- *Frontier Refining Inc. v. Gordon Rupp Co.,,* 136 F.3d 695, 703-4 (10th Cir. 1998) (relationship required)

35. Work product developed by or for a person in anticipation of one action is not immune from discovery in another action in which the person is not a party.

- *FTC v. Grolier, Inc.*, 103 S. Ct. 2209, 2213 (1983) (The language of Rule 26(b)(3) "protects" materials prepared for *any* litigation or trial *as long as they were prepared by or for a party to the subsequent litigation*." (Second emphasis added))

- *Hawkings v. South Plains International Trucks*, 139 F.R.D. 682 (D. Colo. 1991) (where plaintiff sued manufacturer, site owner must produce work product)
- *Rickman v. Deere & Co.,* 154 F.R.D. 137, 139 (E.D. Va. 1993) (work product immunity may be asserted only by a party)

- *Schultz v. Talley*, 152 F.R.D. 181, 184 (W.D. Mo. 1993) (Kansas Attorney General's office, which investigated college, could not withhold work product from plaintiffs in private action against the college, because Kansas was not a party. This rule applies even though the non-party may be disadvantaged by disclosure)

- *United States v. AT&T Co.*, 642 F.2d 1285, 1297-1302 (D.C. Cir. 1980) (MCI sued AT&T for antitrust violations. In a separate action, the Department of Justice did the same. MCI provided the DOJ with its work product. AT&T sought the work product in the DOJ action. MCI intervened to assert work product immunity. By intervening, plaintiff became a party, for the purpose of Rule26(b)(3), and could enforce the immunity. The immunity was not waived by giving the documents to the DOJ, because MCI and the DOJ shared a common interest in that the success of one could hinge on the success of the other.)

36. Work product immunity has no applicability to work product developed by one party in anticipation of another party's litigation, except that the immunity is sometimes extended if the party asserting immunity had an interest in the other party's litigation.

- *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 924 (8th Cir. 1997) ("We know of no authority allowing a client such as the White House to claim work product immunity for materials . . . prepared whilie some other person, such as Mrs. Clinton, was anticipating litigation.")

- *In re California Public Utilities Comm'n*, 892 F.2d 778, 780-81, (9th Cir. 1989) (memorandum prepared by attorney for public utilities commission analyzing litigation between utilities and supplier was not subject to work product immunity because the commission was not a party)

- *United Coal Companies v. Powell Const. Co.*, 839 F.2d 958, 966 (3d Cir. 1988) ("Counsel for an insurer may invoke work product protection in favor of document prepared by it in anticipation of litigation even though the insurer is not a named party in an action")

37. In some circumstances, a discovery management order may require a party to disclose otherwise immune work product in order to provide for efficient discovery.

- *In* re *San Juan Dupont Plaza Hotel Fire Litigation*, 859 F.2d 1007, 1015-17 (1st Cir. 1988) (upholding a discovery order requiring advance identification of documents to be used in depositions)

38. Work product immunity extends beyond the termination of the litigation in anticipation of which it was prepared.

- *Pamida, Inc. v. E.S. Originals, Inc.*, 281 F.3d 726, 731 (8th Cir. 2002)

VI. PROCEDURAL ASPECTS OF THE ASSERTION OF PRIVILEGES AND WORK PRODUCT IMMUNITY IN FEDERAL COURT

1. A party claiming a privilege or work product immunity has the burden of establishing the factual basis of the claim, while a party asserting that material that is work product should be produced has the burden of supporting the assertion.

- *United States v. Dakota*, 197 F.3d 821, 825 (6th Cir. 2000) (the burden of establishing the existence of a privilege rests with the person asserting it)

- *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 925 (8th Cir. 1997) (work product)

- *Hodges, Grant & Kaufmann v. U.S.,* 768 F.2d 719, 721 (5th Cir. 1985) (work product)

2. A party asserting a privilege must describe the nature of the privileged material sufficiently to permit the opposing party to assess the applicability of the privilege. A non-party asserting a privilege in response to a subpoena must do the same. In document productions, this is commonly construed to require preparation of a "privilege log." Ordinarily, a privilege log must describe privileged documents on a document-by-document basis, though there may be exceptions. Failure to assert a privilege adequately may result in its waiver, and some courts apply exacting standards. These principles also apply to assertions of work product immunity.

- Fed. R. Civ. P. 26(b)(5)(A):

> Claims of Privilege or Protection of Trial Preparation Materials. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable

other parties to assess the applicability of the privilege or protection.

- Fed. R. Civ. P. 45(d)(2)(A) (similar language)

- *Rabushka ex rel. U.S. v. Crane Co.,* 122 F.3d 559, 565 (8th Cir. 1999) (a party asserting the attorney-client privilege has the burden of providing a factual basis for it, and may meet the burden by providing a detailed privilege log stating the basis for the claim for each document, together with an explanatory affidavit)

- *United States v. Davis*, 636 F.2d 1028, 1044 n. 20 (5th Cir. 1981) (failure to demonstrate the applicability of the privilege to a particular document would waive the privilege)

- *Williams v. Sprint/United Management Co.,* 238 F.R.D. 633, 645-6 (D. Kan. 2006) (failure to assert the attorney-client privilege in a privilege log may result in waiver of the privilege, even though work product immunity was asserted)

- *Diamond State Ins. Co. v. Rebel Oil Co., Inc.*, 157 F.R.D. 691, 698 (D. Nev. 1994) (privilege log should state (a) the attorney and client; (b) the nature of the document; (c) the persons shown on the document to have received it; (d) others who received it or were informed of its substance; and (e) the date of the document)

- *Eureka Fin. Corp. v. Hartford Accident & Indem. Co.*,136 F.R.D. 179, 184 (E.D. Cal. 1991) (whether blanket assertion of privilege ("[W]ith the exception of matters protected under the attorney-client privilege . . . defendant will produce. . .") is a waiver of the privilege should be analyzed under an inadvertent waiver standard. Relevant factors include precautions taken to assert privileges properly, and timeliness of effort to rectify improper blanket assertion)

- *Marens v. Carraba's Italian Grill*, 196 F.R.D. 35, 38-9 (D. Md. 2000) (the attorney-client privilege and work product immunity have many elements, and the failure to show the existence of each element renders them inapplicable. However, in some circumstances it may be possible to provide particularized facts that would support an assertion that it would be unfairly burdensome to provide a document-by-document analysis of each privilege claim.

3. If a party gives notice that it has produced in discovery information that it claims is privileged or subject to work product immunity, and states the basis for the claim, a party that received it must return, destroy or sequester the information, refrain from using or disclosing it, and attempt to retrieve the information if it was disseminated before the notice. This applies until the claim is resolved. A receiving party may present the information under seal to the court for a determination of the claim. This procedure does not shift the burden of the claimant to support the claim, and absent an agreed protocol to the contrary, does not preclude a finding of waiver by disclosure. A person who claims that information produced in response to a subpoena is subject to a privilege or work product immunity has this same remedy.

- Fed. R. Civ. P. 26(b)(5)(B) (production by a party)

- 2006 Amendment Advisory Committee comment to Rule 26(b)(5)(B)

- Fed. R. Civ. P. 45(d)(2)(B) (production by a non-party)

- Proposed F.R.E. 502 provides that an inadvertent disclosure of information covered by the attorney-client privilege or work product protection, made in spite of reasonable precautions, will not result in a waiver as to any party or third person, as long as reasonably prompt measures to rectify the error are taken, including compliance with Fed. R. Civ. P. 26(b)(5)(3).

4. Parties may agree on and seek to have incorporated in case management orders protocols that go beyond Fed. R. Civ. P. 26(b)(5)(B) in promoting efficient production of documents by protecting against waiver of privileges and work product immunity.

- Fed. R. Civ. P. 26(f)(4)

- 2006 Amendment Advisory Committee comment to Rule 26(f)(4) (noting "quick peek" and "clawback" agreements that preclude assertions of waiver by a party)

5. The issue of the existence of a privilege or work product immunity is determined pursuant to F.R.E. 104(a), which permits the court to consider in preliminary proceedings hearsay and other evidence that would be inadmissible in trial.

- *Burton v. R.J. Reynolds Tobacco Co.,* 167 F.R.D. 134, 142 (D. Kan. 1996)

- *U.S. v. Roxworthy,* 457 F.3d 590, 597 (6th Cir. 2006)(burden of showing anticipation of litigation may be satisfied by any of the traditional ways in which proof is produced in pretrial proceedings, such as affidavits)

6. Notwithstanding F.R.E. 104(a), which excludes privileged material from consideration in preliminary proceedings, and F.R.E. 1101(c), which provides that privileges are applicable at all stages of proceedings, a court has discretion to conduct an *in camera* inspection of documents, including through a special master, to determine whether a claim of privilege is valid. Ordinarily, this is done after the party seeking disclosure shows a factual basis for a reasonable good faith belief that an inspection may reveal non-privileged material. The party seeking disclosure is not entitled to be present, but should be allowed to present evidence and argument.

- *In re Bankamerica Corp. Securities Litigation,* 270 F.3d 639, 641-5 (8th Cir. 2001)

- *In re General Motors Corp.,* 153 F.3d 714, 715-17 (8th Cir. 1998)

- *In re Grand Jury Investigation.,* 974 F.2d 1068, 1071-5 (9th Cir. 1992) (the *Zolin* standard for crime-fraud *in camera* review applies equally when a privilege claim is contested on other grounds)

- *U.S. v. Zolin,* 109 S. Ct. 2619, 2627-32 (1989)

7. A district court order to produce a document claimed to be privileged, production of which would defeat the privilege, may be subject to mandamus, if the ruling is clearly erroneous and there is no other adequate means of relief. Some courts deem such an order appealable as a final order under 28 U.S.C. § 1291.

- *Baker v. General Motors Corp.,* 209 F.3d 1051, 1053 (8th Cir. 2000) (mandamus)

- *In re Executive Office of the President,* 215 F.3d 20, 23 (D.C. Cir. 2000) (the substantiality of the invasion is a factor in determining whether mandamus is available)

- *In re Grand Jury Subpoenas*, 123 F.3d 695, 699 (1st Cir. 1997) (allowing appeal and overruling precedent that an immediate appeal is available only upon issuance of a contempt citation for defiance of an order to produce)

- *In re Bieter Co.*, 16 F.3d 929 931 (8th Cir. 1994) (mandamus)